SUPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 1003

CLIFFORD J. LOCKE,

Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF

THE STATE OF CALIFORNIA, FIRST APPELLATE

APPENDIX "A"

Constitutional and Statutory Provisions Involved

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

have been committed,...

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The validity of the statute involved is California Corporate Securities Law §26104 (a) - (f).

Public offenses; penalty. Every officer, agent, or employee of any company and every other person, who does any of the following acts is guilty of a public offense punishable by imprisonment in a state prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment:

(a) Issuance or sale of security in nonconformity with permit. Knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this division, or of the Constitution of this State.

(b) False statements to commissioner. In any application to the commissioner, or in any proceeding before him, or in any examination, audit, or investigation made by him or his authority, knowingly makes any false statement or representation, or, with knowledge of its falsity, files or causes to be filed in the office of the commissioner any false statement or representation concerning the company or the property which it then holds or proposes to acquire, or concerning its officers or its financial condition or other affairs, or concerning its proposed plan of business, or, with knowledge of the falsity of any such statement or representation, issues, executes, or sells, or causes to be issued, executed, or sold, any security.

(c) Application of security proceeds in violation of permit. Directly or indirectly, knowingly applies, or causes or assists in causing to be applied, the pro-

ceeds, or any part thereof, from the sale of any security to any purpose contrary to the provisions of the permit authorizing the issue of the security, or to any purpose specified in the permit in excess of any amount limited in the permit to be used for that purpose.

(d) Sale of security issued in violation of law. With knowledge that any security has been issued or executed in violation of any provision of this division, sells, or offers the security for sale.

(e) False, misleading, or deceptive advertisement. Issues, circulates, or publishes, or causes to be issued, circulated, or published, any advertisement, pamphlet, prospectus, or circular concerning any security containing any statement that is false or misleading, or otherwise likely to deceive a reader thereof, with knowledge that it contains such false, misleading, or deceptive statement.

(f) Violation of law or commissioner's order or permit. In any respect wilfully violates or fails to comply with any provision of this division, or wilfully violates or fails, omits, or neglects to obey, observe, or comply with any order, permit, decision, demand, or requirement, or any part or provision thereof, of the commissioner under this division. (Vol. 25, page 510)

Another relevant statute is: Penal Code §484.

Theft defined. Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely

of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any addi-

tional employee or employees without advising each of them of every labor claim due and unpaid ~~and every~~ judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud. (Vol. 48, page 596)

APPENDIX "B"

Copy of Locke's Affidavit

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
County of)

I, CLIFFORD J. LOCKE, being first duly sworn on oath, depose and say:

The documents which are the subject of this petition were located at 211 Professional Building, El Cerito, California. In late 1964 or early 1965, it was discovered that my filing cabinet had been broken into and I assumed that it was for the purpose of somebody stealing money. There was no money in my office. I did not realize that a certain account book was missing which would have been helpful to me in the trial.

That at the time of the trial of this case, I attempted to locate it for the purpose of the trial and could not do so. I wanted to furnish it to my attorney, with whom I only had three hours to

discuss the case prior to the trial. The case took three weeks.

That I could not locate it and assumed that it had been lost in the move. Within the last 60 days, the Internal Revenue Service has made the document available to my accountant, James Boodell, to assist in preparation of tax returns.

That the Internal Revenue agent was asked where he had gotten it and he stated that he could not say whether or not he had gotten it from the D.A.'s office, because he had agreed not to tell where he had gotten it.

That my attorney contacted the D.A.'s office and was told that an Internal Revenue agent had been there and may have taken some of their documents.

That if they had an opportunity to look at the book of account that they could state whether or not they had it in their possession at the time of trial.

That because of the time for filing this motion I have not had an opportunity to show the book of account to the D.A.'s office.

That I believe and therefore allege that the D.A.'s office or some other law enforcement agency of the State had the document and concealed this fact from me.

That portions of the document would have been exculpatory to the defense during the trial, particularly in connection with the alleged false statements to the commissioner and fraud charges.

Further, had the People not had this book, they may have not been able to discover some of their witnesses and who some of the defense witnesses may have been. Further, the circumstances surrounding the disappearance of the book, although I do not have actual proof on this, may constitute an illegal search

and seizure by the People.

/s/ Clifford J. Locke
Clifford J. Locke

Subscribed and sworn to before me this ___ day of August, 1969.

/s/ Carolyn Venturini
Notary Public for Calif.
Commission expires 10-15-69

APPENDIX "C"

Some of the Newspaper Articles

Oakland Tribune--June 24, 1965

Sleuth Indicted In Securities Case

Clifford J. Locke, 35, El Cerrito private detective and one-time San Pablo police sergeant, has been indicted by the Alameda County grand jury on charges of selling securities without a license.

The district attorney's office said Locke obtained more than $100,000 from persons who invested in his Check-Stop firm in Albany.

Deputy District Attorney James L. Crew said the grand jury action against Locke is the first phase of an investigation and that the jury will be summoned later to consider grand theft charges against him.

Bail Established

Presiding Judge Monroe Friedman set bail at $2,000.

Crew said arrangements had been made for Locke to surrender later.

Locke was indicted for one count under the Corporate Securities Code after five witnesses testified as to their dealings with him.

The district attorney's office said that the check-stop office has been closed.

Legitimate Service

The spokesman said Locke offered a legitimate service to businessmen but fell afoul of the law in its financing.

The service was based on a file of over 100,000 names of persons who passed worthless checks. A merchant subscribing to Locke's innovation contacted the detective agency when he was suspicious about cashing a customer's check. Within minutes, the subscriber was given information to help him avoid cashing bad checks.

Locke reportedly started the file

while a San Pablo police sergeant and augmented it when he became a private detective.

2 Suspensions

Locke was one of the best known law enforcement officers in the Eastbay when in 1960 he took a two-year leave of absence from the department after he was involved in two suspensions.

He subsequently became a private detective.

In 1962 his private detective license was restored after having been suspended for 30 days by the State Department of Professional and Vocational Standards. The suspension came after Locke allegedly represented himself to an accident victim as an investigator for his insurance company when he was employed by an opposition insurance firm.

Albany Times--July 7, 1965

Albany Police Aid Indictment of Former Police Sergeant

A case under investigation by members of Alband Police department since last Feb. 17 has resulted in an indictment by the Alameda County grand jury of Clifford J. Locke, 35, El Cerrito private detective, on charges of selling securities without a license.

Albany Police Inspector Art Smith was notified by two local residents last February that they had given money to Locke for his Check-Stop firm in the Plaza Professional building in Albany. They were to receive their money back in a limited time and never did.

Smith said it was established that Lock misrepresented the dealings in violation of the corporate securities code. Investigation revealed that a number of other people had invested in the same company without return on their invest-

ment.

Locke, a one-time San Pablo police sergeant, has obtained more than $100,000 from persons who invested in his Check-Stop firm, Smith said. Ironically, he is well-known to most members of the Albany department and frequently visited at headquarters. Inspector Smith has worked on cases with him.

Following his independent investigation, Smith contacted Corporate Securities and brought it to the attention of the district attorney. Many persons were interviewed before a secret indictment was forthcoming from the county grand jury on June 15. The grand jury was to reconvene July 6 or 7.

The Check-Stop office has been closed. It offered a legitimate service to business men, Smith said. The complaint involved his methods of financing the business.

The service was based on a file of over 100,000 names of persons who passed worthless checks. A merchant subscribing to Locke's service contacted the detective agency when he was suspicious about cashing a customer's check. Within minutes, the subscriber was given information to help him avoid cashing bad checks.

Oakland Tribune--Tuesday, May 24, 1966

Ex-Policeman on Trial for Fraud

Ex-policeman Clifford J. Locke is on trial on charges of illegally selling stock in a check detecting service, theft of money from investors and making false statements to the State Corporations Commissioner.

Locke, a one-time San Pablo police sergeant, was indicted by the Alameda County Grand Jury last June. His trial opened yesterday before Superior Court

sums over to Locke.

All that's ever been returned of the total $17,100 investment, she said, is approximately $1,800.

On questioning from deputy dist. atty. Thomas Buckley, Mrs. Brown explained that she turned the money over to Locke because he said he was "doing me a favor" and she would eventually own 10 per cent of the Check Stop firm. She said he claimed the firm would eventually pay her $800 to $1,000 a month for life.

Mrs. Brown, now 30, has a seven-year-old daughter. She spoke hesitatingly during the trial, explaining she suffered a stroke in 1967. She broke into tears twice, once when she was having difficulty recovering herself, another time when she confronted Locke during a recess.

On cross-examination Mrs. Brown said she had filed for a divorce a year prior to her husband's death but

reconciled after a six month separation. She said she dated Locke for two months during the separation.

Following Mrs. Brown to the witness stand was James L. Barnett of Concord. He told the jury that he worked for Locke as his sales manager and invested $2,000 in Locke's firm in return for a promise of four per cent ownership. He said his money was not returned.

The district attorney's office says Locke started his check stop firm after leaving the San Pablo police force, where he was a sergeant, in 1969. They say more than $150,000 was loaned to him or invested in his firm over a period of four years and most of it was not returned.

Oakland Tribune May 27, 1966

Witness Fins Deal on Ex Cop

A San Jose heavy equipment operator has testified that former San Pablo

police sergeant Clifford J. Locke admitted to him that he had committed "all kinds of violations" in operation of a check detecting firm he operated.

Steven E. Van Tuyl told his story to a jury of five women and seven men before Alameda County Superior Court Judge Folger Emerson. Locke is on trial for selling shares in his Check-Stop, Inc., company without a state permit, bilking three persons out of money and giving false statement to the corporations commissioner.

Van Tuyl testified that he lost $5,000 in paying Locke for two tractors which he then found to be encumbered by chattel mortgages by a Portland finance company.

Contacted D.A.

Under questioning of Deputy Dist. Atty. Thomas J. Buckley, Van Tuyl said he telephoned a complaint about Locke

the Contra Costa County district attorney's office but got no satisfaction.

Van Tuyl then went to Locke and told him he had been in contact with the D.A. who wanted to know when the money transaction took place.

He quoted Locke as replying the deputy "must have been pretty green; I could tell you all kinds of violations I have committed." Then, Van Tuyl said, Locke named various forms of theft.

State law prohibits sale of encumbered property without notification to the buyer.

Richard H. Wilson, a one-time treasurer of Check-Stop, told of steps taken to obtain the chattel mortgage in Portland.

Wrote Check

Locke then had $10,000, deposited in an Oakland bank account of a stone quarry organization and wrote a $8,850 check in

payment for the tractors to Check-Stop, the witness said.

Wilson said that he quit the firm a few days later when Locke asked him to issue another check in a dispute with a creditor. "This was the end for me with Check-Stop; it had nothing to do with the tractors," Wilson declared.

Over the protests of Locke's attorney, Walter Culpepper, Buckley got in testimony on "a similar" of an investment and loans by a reported woman victim, whose loss is not charged.

Made Loans

Morilla Morrelli, a Berkeley letter carrier, related that she was impressed with the operation of the firm, set up to protect markets from bogus check-passers. Over a period 1962-64 she loaned Locke $6,000 and got back only $1,715 by "blowing my top" and making herself "a pest" at Locke's Albany offices:

"I made 200 or more trips. Every time I had spare time I'd be out at his office, which was "quite an impressive place."

Mrs. Morrelli said she was making the investments on the representation that she would get 10 per cent of the company's stock and Locke was to buy it back.

Oakland Tribune--May 28, 1966

Locke Trial Told About Lost Hopes

The parade of witnesses telling of the high hopes they had when they invested in the bogus check detecting firm of former San Pablo policeman Clifford J. Locke is scheduled to continue when Locke's criminal trial resumes at 10 a.m. Tuesday.

Deputy Dist. Atty. Marie Bertillion Collins said there will be testimony from at least three more investors, including

one man who lost $40,000 in the business.

As the first week of the trial ended yesterday in Alameda County Superior Court, eight witnesses had told a five woman, seven man jury of loaning or advancing a total of $41,500 to Locke and getting little or none of it back.

Most said they were promised an interest in his Check-Stop, Inc. company.

Locke is on trial on nine grand jury indictments accusing him of selling stock without a permit, grand theft from his investors and making false statements to the commissioner of corporations.

Chief witnesses yesterday were two former employes, Herman Langner, of El Sobrante, former general manager of Check-Stop, and Almoi Jongewaard, of Castro Valley.

Langner testified he loaned more than $2,000 to Locke and received an option to purchase 25 per cent of the

firm--an option he did not exercise.

Jongewaard said he gave Locke $1,000 for a three per cent interest in the firm and got none of the money back.

Both said that when they left the firm they had back wages coming to them.

Locke started his Check-Stop firm after leaving the San Pablo police force, where he was a sergeant, in 1960. The district attorney's office contends more than $150,000 was loaned to Locke or invested in his firm over a period of years with most of it unreturned.

APPENDIX "D"

The Opinion

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

CLIFFORD J. LOCKE,

Defendant and Respondent.

_____/

1 Crim. 5965

Defendant has appealed from a judgment (order granting him probation with a six month's jail term[1]) following his conviction of five counts involving violation of the Corporate Securities Law (Corp. Code, former § 25000 et seq., particularly §§ 26104, subds. (a), (b)

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[1]Defendant was admitted to bail. Delays attendant to processing his appeal have been occasioned by his substitution of private counsel who rebriefed the case after the matter had been sent for a hearing on issues raised by a brief filed by appointed counsel.

and (f), as in effect prior to January 2, 1969, and preserved by section 25704, subd. (a), as added by the Corporate Securities Law of 1968), and two counts of grand theft (Pen. Code, §§ 484 and 487) after a jury trial. Defendant's contentions on appeal may be grouped in the following categories: (1) that newspaper publicity deprived him of a fair trial; (2) that former section 26104 of the Corporations Code was unconstitutional; (3) that the jury was improperly instructed on the legal effect of the transactions charged in the first four counts; (4) that he was improperly convicted of making a false statement in the application (5) that he was improperly convicted of grand theft involving the transaction with one Beyrle; (6) that there was prejudicial error in the instructions on corroboration by similar false representations; (7) that evidence of similar

transactions was improperly admitted; (8) that he was improperly convicted of grand theft involving the transaction with Van Tuyl; (9) that it was error to refer to the appointments of his offices and to his trips to Hawaii and Nevada; and (10) that there was prejudicial error in the opening and closing arguments of the district attorney.

These contentions are examined and found to be without merit. The order granting the defendant probation must be affirmed.

Statement of Facts

Defendant Clifford J. Locke is a former police officer with the San Pablo Police Department, who, beginning in 1960 operated and was the sole owner of Locke Detective Agency with offices in El Cerrito Plaza. Sometime in 1961, defendant decided to form a business that would provide the names of persons who had written or

passed bad checks to various merchants. He then began accumulating information and hiring employees to process the information for the new business. During 1961, he accumulated several hundred thousand names for a master file. Early in 1962, he started conducting this business under the name of Check-Stop, while continuing to operate Locke Detective Agency.

The Check-Stop service was sold to merchants who could call Check-Stop, in cases of suspicious check passers, to determine if the name were on file. The merchants, in turn, reported any bad checks. The service was run on a 24-hour basis and utilized about 30 individual telephone lines on which calls could be received. Locke Detective Agency and Check-Stop jointly occupied a suite of rooms located in El Cerrito Plaza and used equipment and office furniture which was, for the most part, leased.

The business was subsequently incorporated in April 1963. It was in the course of developing, incorporating and financing Check-Stop that the transactions which formed the basis for defendant's convictions occurred. The history of Check-Stop presented at trial, will be discussed in chronological order.

James Larry Barnett first met defendant late in 1961 or early in 1962 while he was a telephone company salesman making provision for telephone service at defendant's location at El Cerrito Plaza. Barnett then took to stopping in to see how things were going. During this period, defendant explained his new business idea to Barnett. Since telephone service was a key aspect of the business, he asked Barnett for ideas. Barnett made various proposals for telephone services, and between December 1961 and February 1962 telephones were in-

stalled consisting of about 30 individual lines with individual numbers able to ring in. Defendant had by 1962 moved into the four rooms of the Check-Stop location, had dropped his guard service and was operating as Check-Stop and Locke Detective Agency. During this period defendant had conversations with Barnett about coming to work for Check-Stop.

In 1961, defendant also discussed his idea for the check service with Herman B. Langner, a former army acquaintence, who was then working for Dun and Bradstreet. Following discussions of the feasibility of his working for defendant, Langner accepted such employment when it was offered in late 1961 or early 1962. Langner was to be paid $1,000 per month with an option to buy 25 percent of the business for $5,000 paid over a three-year period. He indicated the "main inducement" to join Check-Stop was the opportunity to

participate in the business. He started working for Check-Stop in March 1962 with the understanding that he was to run Check-Stop and defendant was to run Locke Detective Agency. At this time six to ten girls were working for Check-Stop organizing the files but there were no customers.

Langner's duties were to build up a working crew and start sales promotion. He also set up an accounting system, although he had no training as an accountant, received the accumulated bills, attempted to make payment, and started Check-Stop's bank accounts. An attempt was made to refine procedures so that Check-Stop would have a good service to sell, and, after conferences on charges, $120 per year or $10 per month was established as a typical account charge. After discussions with defendant and others, and reference to the first simple books kept in the business,

Langner also prepared sales and income projections, monthly operating expenses, and a financial statement for Check-Stop. The income projection showed projected net profit before taxes of $83,991.20 and $116,000. It was based on continuing accumulation or renewal of accounts at the rate of 200 per month. Because the company needed money at this time, Langner made a loan of $1,667 (one-third the option price in case he exercised it) on April 6, 1962, and other advances. At this point he felt he was advancing money not investing in Check-Stop.

During this early period defendant also obtained money from several other sources.

On February 19, 1962, in the Check-Stop offices, Rilla Morelli was introduced to defendant by her brother. At this time she loaned defendant $1,000. She returned again on April 2, 1962 and she and defendant discussed the Check-Stop business at

length. Defendant explained the operation and gave her a prospectus containing figures about future income. The projection was for a yearly net profit of $116,000 per year before taxes. Mrs. Morelli then gave defendant a check for $5,000. In return he gave Mrs. Morelli a promissory note for $7,000 payable in 90 days. (This included the previously received $1,000)[2]. He also promised to have papers drawn up to confirm their agreement for transfer of a 10 percent interest which Mrs. Morelli believed to be a limited partnership. In a letter dated April 17, 1962, defendant confirmed the

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[2]At the trial defendant attempted to show that he always had to give people notes for more than the amount of their loan, because of the exorbitant and usurious interest charged. An examination of the transactions involving Mrs. Morelli, Jongewaard, Beyrle, Rhea, Yamashita, Brown, show that, at the very least, the investors expected large returns, on short term investments. The investors all indicated that, contrary to defendant's assertions, returns were voluntarily promised by defendant.

verbal agreement that Mrs. Morelli would receive 10 percent of the net profits of Check-Stop. At the end of the year defendant was to buy back this 10 percent interest for $14,000. When nothing was paid in 190 days, Mrs. Morelli "blew [her] top and went out to his office." After repeated visits, estimated at 200, she recovered a total amount of $1,715 between August 17, 1962 and October 16, 1964. Defendant never tried to buy back the 10 percent interest.

In 1962 Mary Haynes met defendant through her daughter who was then working for defendant. Defendant asked Mrs. Haynes to lend him money to get started. Her daughter had talked about Check-Stop, and defendant explained the business to her. Mrs. Haynes loaned defendant some $6,000 in May 1962. On May 21, 1963, defendant signed a promissory note for $6,662, a renewal of this loan. She had been paid

back only $50. A $268 payment had been reborrowed.

Sharon C. Brown met defendant early in 1961. She had been introduced to him by her husband.[3] Mrs. Brown's husband died on April 9, 1962 and as a result she received $15,000 from insurance. After her husband's death, defendant contacted her. He told her that Check-Stop was wonderful, that in a year she would not have to work and that he would pay her $800 or $1,000 a month for the rest of her life. He asked for a loan. Following consultation between her attorney and defendant's attorney, she loaned defendant $4,100 and received a chattel mortgage and a deed of trust. The exchange took place on April 18, 1962.

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[3]During part of 1961, Mrs. Brown was separated from her husband pending divorce. She was employed by defendant during this period but apparently had more than a business relationship with him. She subsequently reconciled with her husband.

Defendant subsequently told Mrs. Brown more about Check-Stop and showed her a sales and income projection indicating Check-Stop's anticipated yearly net profit to be $83,991.20. Defendant then asked for another loan because he had paid his employees with bad checks. She gave him $1,000 on June 18, 1962. Defendant next asked her to borrow on her car. On July 17, 1962, she borrowed $2,054.86 on the automobile from the Mechanics Bank of which Gerald Nelson, subsequently to be a director of Check-Stop, was the manager. She thought defendant would pay back all the money.

On June 19, 1962 she withdrew $9,000 from a savings and loan institution and deposited it in a savings account at this same Mechanics Bank. In accordance with defendant's plan, $9,000 was then borrowed for Check-Stop from the Mechanics Bank, the note signed by defendant and Mrs. Brown,

and the savings account assigned as security for the loan. Mrs. Brown testified that she was to get 10 percent for this loan.[4] On December 2, 1962, defendant wrote Mrs. Brown that any funds taken from her account to pay the loan would be repaid by July 13, 1963. The chattel mortgage held by Mrs. Brown to secure the previous loan was reconveyed when defendant promised to get $10,000 from a "factoring place." On January 16, 1964 the bank withdrew her account. Between July 1962 and January 1964 defendant paid Mrs. Brown a total of $4,975.81, some of which was to

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[4]Mrs. Brown's testimony is ambiguous. She suffered a stroke in 1963 and at the time of trial could neither read nor write and apparently had some difficulty in making herself understood. Her testimony could be interpreted as that she was to get a 10 percent interest in Check-Stop, or 10 percent was the interest rate on the money. The jury acquitted defendant of a Corporations Code violation involving Mrs. Brown, which was charged in a separate action but consolidated for trial with the offenses under review.

pay subsequent short-term advances. Mrs. Brown testified she believed she was to become a silent partner in Check-Stop, did not believe she was buying shares, and could not remember if she was ever told she would become a shareholder.

In March of 1962 Almoi Jongewaard was hired by Langner to work for Check-Stop. His duty was to sell the service. In June defendant had trouble meeting his bills and asked Jongewaard if he knew anyone interested in investing. Defendant then asked Jongewaard, who was interested in the business, if he had any money to invest. Mr. Jongewaard subsequently invested $1,000. In an agreement signed June 6, 1962, Jongewaard was to get a 3 percent limited partnership with an option to purchase an additional 7 percent. Defendant also signed a promissory note at this time agreeing to pay back the $1,000. After the agreement, Jongewaard's duties

remained the same.

James H. Connelly, a doctor with offices in San Pablo, had known defendant for ten years. In April 1962 he had a conversation with defendant about his signing a $10,000 guarantee for factoring services to be accorded to Check-Stop. Subsequently, Dr. Connelly cosigned a $10,000 note at Bank of America, the proceeds of which were to be used for the management of Check-Stop. Apparently in exchange for this, Dr. Connelly received a letter giving him a 10 percent limited partnership in Check-Stop.

At about this same time, he signed a guarantee for Redwood Factors. Redwood Factors was a financing company which entered into a contract with Check-Stop for the purpose of financing accounts receivable. The accounts were assigned as collateral for money loaned. Redwood Factors loaned money to Check-Stop and

80 percent of Check-Stop's receivables were assigned from July 27, 1962 through December 1962. The customers under these accounts were to make their payments directly to Redwood Factors. In September of 1962, on defendant's request, Dr. Connelly increased the guarantee to $25,000. After signing as guarantor, Dr. Connelly learned that the Bank of America note had not been paid. Dr. Connelly subsequently paid this note.

In October 1962 Dr. Connelly began taking an active part in the business. He estimated monthly expenses at that time to be $7,000. He and defendant tried to reduce expenses and tighten control. Expenses were cut to about $3,500 per month. Dr. Connelly personally paid a number of Check-Stop bills and notes.

By December 1962 both Barnett and Jongewaard were with Check-Stop. Barnett had accepted defendant's offer of employ-

ment and began work on December 1, 1962 as sales manager, his salary to be 10 percent of actual sales with a $600 per month guarantee for 90 days. Herman Langner was general manager at this time, but left early in December.[5]

Barnett testified that because of delays in meeting salary obligations, "The subject of money was very heavily under discussion around the office." Defendant raised the possibility of Barnett investing in Check-Stop to keep the business going. Defendant assured Barnett that Dr. Connelly would take over the "financial reins" because of the shaky financial situation, and that investors were needed to match Dr. Connelly's investment. Finally, Barnett paid $2,000 for 4 percent with an additional one percent when the

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[5]During his time with Check-Stop, Langner was never fully a manager. Although he participated in policy decisions at first, Check-Stop was basically defendant's business. Langner never bought an interest in the business.

business broke even. Barnett's check dated December 24, 1962 noted, "In payment of 4% of the business known as Check Stop." The agreement signed by defendant on December 24, 1962 also noted that Barnett received 4 percent of Check Stop when the $2,000 was paid and noted receipt of $2,000.[9] Barnett felt he was buying an interest in the business.

At the time of this transaction Barnett knew that Check Stop was in the "red." He understood that Dr. Connelly would more or less take control and that Check Stop was to be incorporated. After the agreement Barnett tried to hire salesmen and did selling himself. The financial situation became increasingly strained. Barnett left Check Stop on February 15, 1963, and at the time was owed an additional $800 in salary. While at Check Stop, he

[9] This is the transaction charged in Count 1 of the indictment in the case under review.

did not participate in policy decisions or sign checks, and he hired personnel only with the approval of defendant. He did not participate in the plans to incorporate.

In November and December 1962 Dr. Connelly had discussions with defendant about the business being 50-50 and an agreement was drawn up. On December 27, 1962, a memorandum agreement was signed giving Dr. Connelly a 50 percent interest in Check-Stop and agreeing that Check-Stop would be incorporated. The agreement also established that defendant had a 43 percent interest in Check-Stop, that 4 percent was to go to Barnett, one percent to William J. Connelly, and 2 percent to Charles Van Dyne. At this time, as recited in the agreement, Dr. Connelly had advanced a sum of $20,450 to defendant.

Early in March 1963 Dr. Connelly talked about ending his relationship with Check-Stop. An agreement was signed on

March 12, 1963, in which Dr. Connelly relinquished his interest and defendant agreed to pay him $22,000 at $5,000 per year, beginning July 1, 1964, with interest at 2 percent per year. Subsequently Dr. Connelly paid Redwood Factors $9,000. In all he put $40,800.80 into Check-Stop, none of which was repaid.

In April 1963 Check-Stop was incorporated. A permit was issued on April 12, 1963, authorizing the sale or issuance of stock to the following persons: Clifford J. Locke, Gerald L. Nelson, James H. Connelly, William Connelly, Charles M. Van Dyne and Larry Barnett. The permit was issued on condition that an escrow holder, approved by the Commissioner, be appointed, and that shares not be transferred or removed from escrow without the permission of the Corporation Commissioner. The financial statement upon which the charge laid in Count VI was predicted,

was submitted in connection with these proceedings. Defendant's conviction on that count is reviewed below.

At about the time of incorporation defendant also obtained some financing from Earl L. McGowan in two transactions. On April 26, 1963 he borrowed $10,000 and in a letter dated April 26, 1963 confirmed "our understanding that we will cause our attorneys to apply to the Corporations Commissioner for permission to issue or to sell to you 10 percent of the stock to be issued by Check-Stop, Inc., under its existing permit." On May 6, 1963 he borrowed an additional $6,000, and a similar letter, referred to 18 percent of the stock, issued.

In September 1963, defendant told Longeward he would be wise to sign a release of his partnership interest to

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The letter of April 26, 1963 was prepared by defendant's attorneys. Mr. Barton testified that he was unaware of the loan at this time.

avoid becoming financially liable for Check-Stop's debts. Although no payment was made, Jongewaard signed a release which recited consideration had been received and which referred to Check-Stop as a corporation. The $1,000 was never paid.

On September 19, 1963, the Corporation Commissioner appointed Robert R. Barton, defendant's attorney, as escrow holder.

The authorized shares, totaling 1500, were issued in September as follows: Clifford J. Locke (defendant), 1,380 shares; William H. Connelly, 15 shares; Charles M. Van Dyne, 30 shares; and Larry Barnett, 75 shares. All authority to sell shares under the permit expired on October 10, 1963. Pursuant to the escrow condition, the shares issued were held by Mr. Barton and were never distributed. No other permit was issued to Check-Stop, Locke Detective Service or defendant, nor

was any application for renewal ever made to the Corporation Commissioner.

In October 1963 Thomas A. Beverle was looking for an investment management opportunity. Gerald Nelson of the El Cerrito Plaza Mechanics Bank brought Check Stop to his attention and introduced him to defendant. Defendant explained the nature of the Check Stop business and discussed his financial troubles. He told Beverle he was a bad manager and unable to pay immediately pressing telephone bills. Telephones, of course, were essential to Check Stop. He showed Beverle a financial statement showing liabilities to be about $35,000. The statement indicated that Locke had placed an asset value of around $40,000 on his files, but Beverle himself appraised the assets of the business at about $15,000. Defendant stated that he owned 80 percent of Check Stop and that the stock was in escrow but could be released.

Defendant also informed Beverle that

Check-Stop had 200 accounts, but discussion primarily involved an account with Lucky Stores. Defendant informed Beyrle that $9,000 was due from Lucky Stores on May I, 1964, and that the contract would be immediately renewed if Check-Stop stayed in business for a period of 12 months. The financial statement carried as an asset a prorated amount of this sum. When Beyrle asked to see the contract, defendant said it was in New York. In addition to this, defendant stated that he had done some work for Ed Turner who was running for office in the Marine Cooks and Stewards Union, and that, as soon as the election was over $10,000 was due.

The first discussion took place on October 25th or 26th. On Sunday October 27th defendant called Beyrle and offered to sell him control of the company and make him its general manager in return for his helping the corporation financially.

Defendant stated that $7,200 would carry the corporation until the other funds came in. This money was to be used for telephone and tax bills. Defendant indicated that if there were no money by noon the next day, the company would be out of business because the telephones would be disconnected. Beyrle went to the Check-Stop offices early on Monday October 28th, and the "hard-sell" started, including the inducement that he would get defendant's plush office. Again he was told the telephones would be cut off at noon. During this time a man - purportedly from the telephone company, but not introduced as such - was pacing outside. The terms of Beyrle's financial help were to be a 60-day $7,200 note to Check-Stop, interest free, for which he would get 51 percent of Check-Stop and 25 percent of Locke Detective Agency. Just before noon Beyrle gave defendant a check for $7,200 and received a handwritten

agreement. This was later exchanged for a formal document dated October 28, 1963 which was drawn up in Beyrle's attorney's office.[8]

This document, in addition to formalizing the oral agreement, stated that "Beyrle is to assume the active direction of the activities of Check-Stop, Incorporated, at any time after the present date that he desires to."

Beyrle had "second thoughts" about the transaction and returned to Check-Stop early the next morning. He called Mechanics Bank and attempted to stop the check but was too late. He thereafter went to Check-Stop to work and stayed about 30 days. Beyrle subsequently obtained a copy of the agreement with Lucky Stores and learned that the terms were not as stated

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[8]This transaction was charged as a violation of the Corporations Code in Count II of the indictment and as a violation of the Penal Code section 484 (grand theft) in Count VI of the indictment.

by defendant. In fact no money was ever paid to Check-Stop by Lucky. The contract instead established a formula under which payment for Check-Stop's services was due only if check losses in the Lucky Stores were reduced in an amount exceeding $9,000. There was no automatic renewal. Defendant was not only aware that the store payment was uncertain, but the proposal for such an arrangement had been submitted by him.

Testimony of officials from the Marine Cooks and Stewards Union showed that all payments due to defendant for his work in connection with the union elections had been paid by June 18, 1963, to a total amount of $11,979. No other contracts with or billings from defendant were on record.

Billy L. Rhea, a Chevrolet salesman in Albany, had known defendant for ten years and had talked about the Check-Stop business with him. In mid-November 1963,

he contacted defendant to collect a car payment. Defendant told him that he had a case in Honolulu for which he had to pick up a fee and that he needed money for the plane fare and hotel bill. Later that day he asked Rhea to help him raise the $800 he needed. The fee to be collected was $1,600. Rhea obtained $800, borrowing $550 from others, and loaned it to defendant who went to Honolulu. Rhea saw him several days later on his return. On December 3, 1963 defendant gave Rhea a check for $800 but the check "bounced."

During November Beyrle became disenchanted with Check-Stop and wanted to withdraw. He told defendant he wanted his money back. Defendant then prepared an agreement; however, Beyrle went to an attorney who prepared an agreement which Beyrle signed. The agreement was dated December 4, 1963, and provided that Beyrle agreed to transfer to defendant all his

rights to stock in Check-Stop and Locke security if defendant paid the $7,200 owed to him on or before February 1, 1964. Beyrle stopped working at Check-Stop full time, but returned on occasion until the end of the period during which the money was to be returned. It was never paid, therefore, he presumed he still had the stock.

On December 9, 1963, Billy Rhea had a conversation with defendant about Check-Stop. At this time defendant told him that the Internal Revenue had called and that the doors of Check-Stop would be closed at noon the following day unless back taxes of $6,500 were paid.[9] He again

[9] Fred L. Wulff from the Richmond office of Internal Revenue testified that the Check-Stop account was in arrears most of the time and that in at least one instance, possibly in December 1963, Check-Stop was told the business would be closed unless taxes were paid. To close a business, it was first necessary to file a tax lien, then post notice of public sale. The minimum time for this would be 10 days. Defendant was informed of the procedure.

asked Rhea to help raise the money. Rhea called Kumao Yamashita, a co-worker at East Bay Chevrolet. The three then met where they discussed defendant's need for $6,500. At this time Rhea endorsed to defendant a $925 check for selling a car.[10]

The next morning, the three met again in defendant's office. Defendant again told them that Internal Revenue would padlock the office unless the taxes were paid. He wanted a short-term loan; he had money coming in from the east coast where an estate was in probate, and also some money coming in from the Marine Cooks and Stewards Union. Yamashita agreed to borrow the money from the Bank of Tokyo and lend it to defendant. In return defendant would transfer a 15 percent interest in Check-Stop to Yamashita and

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[10]The check involved in this transaction is dated December 12, 1963. Defendant claims Rhea did not give him the check for $925 on December 10th, but rather on December 12th.

Rhea. Rhea would then work for Check-Stop, Yamashita left, and two hours later returned with a check for $4,500, all he was able to borrow from the Bank of Tokyo. In the meantime, defendant had typed out a promissory note for $6,500 made out to Yamashita. When Yamashita returned with only $4,500 the note was understood to cover the loans from Rhea as well.[11]

Defendant then gave Rhea and Yamashita a letter, similar to that in the McCowan transactions, confirming their understanding that permission to sell shares would be sought. The letter was written by the defendant and not by his attorney. The $4,500 borrowed from Yamashita was to be repaid in 60 days. Nothing was paid.

On December 14, 1963, Rhea, his wife, a Mrs. Lasket and defendant were in a restaurant in San Pablo shortly before closing time. Defendant suggested they

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[11]See footnote 10, supra

go to Honolulu for breakfast. He made a few phone calls, picked up five tickets at a travel agency, and, accompanied by Mrs. Lasket's 10-year old son, all flew from San Francisco to Honolulu. They checked in at the Hawaiian Village Hotel, stayed in Honolulu about 11 hours and returned. Defendant paid all the expenses of the trip and transacted no business.

In February 1964, Wilfred Wellbrock, the owner of "Todays Markets," went to defendant's Check-Stop office because defendant had written a check for $350 which had been returned. Wellbrock had saved some $400 through Check-Stop since September and was "sold" on the service. Defendant said he needed money - $7,000 - to keep Check Stop going, and that he was to receive $14,000 on February 20th or 22nd from the Marine Cooks and Stewards Union. Defendant asked Wellbrock for the money and indicated it would be repaid by

February 20th. Wellbrock gave defendant a check for $7,000 on February 1, 1964.[12]

The next day defendant asked Wellbrock to come in and manage Check-Stop. In a letter dated February 2, 1964, Wellbrock was to get 51 percent of Check-Stop if he would manage it. Wellbrock then apparently did some work for Check-Stop. The letter was given back, probably in August, because outside investors were coming in.

On February 10, 1964, Wellbrock gave defendant a check for $3,000 to finance a trip to Hawaii. Wellbrock was then to get both this amount and the $7,000 back, because defendant was to pay off a lien on some property in Hawaii which he would then sell. Defendant and Wellbrock went to Hawaii and stayed three days. Defendant

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[12]Billy Rhea cashed this check for defendant in the bank, then accompanied defendant through Albany, Richmond and El Cerrito as he "picked up" checks which had "bounced", including one of $1,680 to the Richmond Travel Agency for the Hawaii trip.

told Wellbrock that he was trying to contack the lady who was to buy the property. He gave Wellbrock an address for the property but there were no discussions about looking at it, and as far as Wellbrock could determine the address meant nothing. Finally defendant said he forgot to bring the deed, and it would take a few days to straighten out.

Back in California, Wellbrock told defendant he could not take the $3,000 deficit in his business. Therefore, defendant gave him a check for $3,000, the funds to come from the $14,000 due from the Marine Cooks Union. The check was no good. Defendant said he had arranged in San Francisco to have $11,000 put into Wellbrock's account. It was never put in. Wellbrock put an additional $10,000 into the business after the Hawaii trip (apparently in February and March).

Late in March or April he and defend-

ant had a meeting with associated counselors about their coming in as a sales organization. Richard A. Wilson, one of those involved in the meeting, worked with Ray Ward in a consulting business in Sacramento. He first learned from a Mr. Bishop that Check-Stop needed help on sales and might be a good account. Bishop contacted Check-Stop and following a meeting between defendant and Wilson, the meeting with Wellbrock took place.

After looking over the Check-Stop operation, Wilson reached an agreement with defendant that Wilson and Ward would perform selling duties for Check-Stop in exchange for 35 percent of the gross sales on a commission basis. Defendant told Wellbrock that the sales organization was to invest $10,000 and that Wellbrock could get his money back then reinvest. In June 1964 an agreement was written to give Wellbrock a majority of the voting

rights and $3,000 per month. Defendant said his father would pay $30,000 if Wellbrock would keep the business going until he disposed of some property. He then gave Wellbrock a note for $29,000.

Wilson and Ward started working for Check-Stop and in 1964 a Mr. Thornburg became interested in Check-Stop. Thornburg told Wellbrock and defendant about some tractors worth $18,000 which could be purchased from Enslow Osie for $8,500, the amount of the chattel mortgage on them. It was unanimously decided among the five, to purchase the tractors through Check-Stop and resell them at a profit. Wellbrock deposited a check for $8,500 in Mechanics Bank to cover the check written for Check-Stop to purchase the tractors. This check was signed by Wilson and Wellbrock.

After the purchase of the tractors, Thornburg, who had an interest in a rock quarry, conceived a plan of utilizing the tractors to quarry rock and sell it to con-

tractors. At this time Wilson's wife owned a corporate "shell" called Fair Oaks Refrigeration Center, Inc. The group - Wilson, Wellbrock, Thornburg and defendant - decided to purchase this corporation to use to do business as Mica-Lite Stone Products. Mica-Lite then would buy the tractors from Check-Stop and refinance them, giving Check-Stop operating capital and Mica-Lite assets. The group then purchased Fair Oaks for $600.

Wilson contacted a relative who owned the Chan Wilson Sales Co. in Portland, Oregon, in order to finance the purchase of the tractors. The tractors were sold by Check-Stop to Mica-Lite for a note, then, in Portland, Chan Wilson acted as broker while Aero-Credit financed the equipment. In exchange for a check for $10,000, a chattel mortgage and note for $12,206 were issued. Defendant deposited the check in the First National Bank of Oakland, then

wrote a check to Check-Stop for $8,850 to pay off the note. About a week later Wilson left Check-Stop after a dispute with defendant over the issuance of a check. Wilson never paid the note and mortgage, and a check subsequently issued by defendant for this purpose "bounced." The mortgage was not paid to Wilson's knowledge.

In September 1964 Wellbrock got a report from his accountant concerning the liabilities of Check-Stop and decided he wanted to get out.[13] He signed a paper brought to him by defendant which provided that he was not enticed into loaning money by a promise of stock, had notes for all monies loaned, and had no ownership interest in Check-Stop.

In August or September of 1964 defendant contacted Tractor Equipment Sales

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[13]The audit report contained in defendant's Exhibit I shows that, as of May 31, 1964, Check-Stop had liabilities of $87,797.90, including $45,242.47 as "loans from officers."

to inform them about two tractors he had for sale. Steven Van Tuyl, a representative of that company went with defendant to Pinole to look at the tractors which were in back of the Wagon Wheel Tavern. Van Tuyl was interested in two HD-3's with loaders and made an offer, but no arrangements were concluded.

On January 14, 1965 defendant called Van Tuyl and said he had to have $5,000 to make a good deal on some stock, and that he would sell the tractors for cash or a certified check. The arrangements were concluded by telephone, and Van Tuyl purchased a cashier's check from the Wells Fargo Bank in San Jose made out to Check-Stop. The next morning he went to Pinole, after calling defendant, and attempted to load the tractors on a truck and trailer. The owner of the tavern would not let him take the tractors because defendant owed money for their repair. Defendant was

called and made an agreement with the tavern owner that he was to be paid out of the $5,000. At this time Van Tuyl stated that he did not want to make a deal if there were any problems with the tractors. He asked if the tavern owner had a lien or if there were any other kind of lien. Defendant assured him that the tractors were free of encumbrances. Defendant signed bills of sale which warranted that the tractors were free of encumbrances. They went to the Check-Stop office where defendant produced a check showing the purchase of the tractors from Enslow Osie. The cashier's check to Check-Stop was given in exchange.[14] Van Tuyl put the tractors in the shop and reconditioned them. The records of the First National Bank of Oakland showed that on January 15, 1965, defendant endorsed and deposited to

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[14]This transaction was the subject of Count VIII of the indictment (grand theft in violation of Penal Code, § 484).

Check-Stop a cashier's check of the Wells Fargo Bank to Check-Stop for $5,000. A second check drawn on Check-Stop, dated January 15, 1965 for $5,000 to cash and signed by defendant, was cashed by the bank.

About a month later, on a Saturday morning, defendant called to ask if the tractors had been sold, saying he had a man who was interested. Some two weeks later, Chan Wilson came in and looked at the tractors. Then two weeks after this, Chan Wilson called Van Tuyl from Portland. Van Tuyl then called his attorney and put the tractors inside. He checked the Contra Costa County recorder's office and found a chattel mortgage on three tractors including the two he had purchased. The mortgage, in the amount of $12,206 was dated October 2, 1964, signed by defendant and Richard Wilson, and showed Fair Oaks Refrigeration

Co., dba. Mica-Lite Stone Products Co. as mortgagor and Aero Credit Corp. as mortgagee.

Van Tuyl had a number of conversations with defendant in which defendant said he was going to repurchase the tractors. He never did. Van Tuyl contacted the district attorney. In a subsequent conversation, Van Tuyl told defendant the district attorney was not sure defendant had committed a crime. In response to this, "Locke laughed and he said, 'Yes, the District Attorneys are really green around the ears these days; certainly doesn't know his business very well; that there is any number of things that they could --' I don't know his exact words -- 'get me for; I think grand theft or larceny or theft in general or larceny through fraud.'" Check-Stop finally closed in February 1965.

Defendant took the stand in his own

defense and explained the background of Check-Stop. He produced quantities of cancelled checks showing various payments made by and for Check-Stop and for Locke Detective Agency. These checks indicated that during the period from 1961-1965 defendant spent $11,613.65 for rent; $9,798.65 for equipment; $37,119.52 for telephone; $99,462.25 for wages (with wages to nonfamily members totaling $79,076.25); $1,700 for advances on commissions; and $61,442.70 for general account payments.[15] He testified that the $9,000 transaction with Sharon Brown was a loan at 10 percent interest, and that the transaction with Barnett was a 4 percent partnership. He testified that Beyrle made a $7,200 loan to pay for the telephones and that it was not to be an

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[15] Defendant denied general account payments as anything other than payroll, rent or lease payments. He termed them miscellaneous expenses.

interest until Beyrle checked with his attorney. He admitted he had nothing due from the Marine Cooks and Stewards Union at this time, but denied that he told Beyrle he did. [16] He also denied telling Beyrle there was $9,000 due on the Lucky contract. He stated that the $7,200 was used to pay the telephone bills the nonpayment of which, he was informed by Mr. Kanewski, would result in loss of service. Mr. Kanewski, however, testified he did not handle the Check-Stop account until 1963. Mr. Savage of the telephone company did deal with Check-Stop during this period and could have been in the Check-Stop office in October.

Defendant stated that the transactions with Rhea and Yamashita were loans for interest (reflected in the amount of the note) and they were told only that if

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[16] He also testified that he unexpectedly did some work for the union in 1964 but had not billed them.

they were interested he would ask his attorney if stock could be issued. For the letter, he used the 'form' developed by his attorney in the McGowan transactions. Nothing was mentioned, he said, about money from the Marine Cooks and Stewards Union.

In regard to the tractors, he testified that to his knowledge, there were no encumbrances on the tractors, that it was his understanding from Mr. Wilson in Oregon that he had paid the tractors off to Aero-Credit, and finally that the mortgage had been paid off. Defendant, however, also admitted that he had sent Chan Wilson a check dated January 14, 1965 for $12,583.84 at a time when he knew he had insufficient funds.

Defendant denied knowledge of any false statement in the application to the Corporation Commissioner. He testified that he had business interests in

Hawaii from 1960 through 1964. He testified generally that he did not have the intention to defraud, or steal money from anyone in any of the transactions conducted with Locke Detective Agency or Check-Stop.

Publicity and Fair Trial

Defendant in reliance on Sheppard v. Maxwell (1966) 384 U.S. 333 contends, for the first time on appeal, that newspaper publicity concerning his indictment and trial deprive him of a fair trial. (See also, Estes v. Texas (1964) 381 U.S. 532, 538; Marshall v. United States (1958) 360 U.S. 310, 312-313; Main v. Superior Court (1968) 68 Cal.2d 375, 381-384; People v. Modesto (1967) 66 Cal.2d 695, 704-705 [disapproved in part, Main v. Superior Court, supra, 68 Cal.2d at p. 383, fn. 8]; People v. Jacobson (1965) 63 Cal.2d 319, 325; People v. Cook (1952) 39 Cal.2d 496, 499-500; People v. Leary

People v. Hernandez (1964) 61 Cal.2d 529, 530-533.)

In People v. McCalla (1923) 63 Cal.App. 783 [appeal dismissed (1924) 267 U.S. 585, disapproved on ground unrelated to this case in People v. Elliot (1960) 54 Cal.2d 498, 503], the court rejected the claim that if there was no specific evil intent to violate the act, the issue or sale of a security was not within the penal clause of the statute then in effect, upon which the law governing this case was predicated. The court stated, "The term 'knowingly' means 'with knowledge,' and when used in a prohibitory statute is usually held to refer to a knowledge of the essential facts; and from such knowledge of the facts the law presumes a knowledge of the legal consequences arising from the performance of the prohibited act. According to the express definition of the word, as given by

our Penal Code, 'knowingly' imports 'only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.' (Pen. Code, sec. 7, subd. 5.)...

"When the intent is not made an affirmative element of the crime the law imputes that the act done knowingly was done with criminal intent. Or, to state the same proposition in a different form, when the statute plainly forbids an act, and the forbidden act is done by the accused, the law implies conclusively the guilty intent, althouth the offender was honestly mistaken as to the meaning of the law he violates. Here the penal clause under which McCalla was convicted does not make an unlawful or evil intent a specific element of the crime. The statute clearly forbids the acts denounced

by it, and its language is plain and positive. Innocence of any intent to violate the terms of the statute is, therefore, no excuse for its violation where the defendant does the prohibited act with a knowledge of the facts which bring his act within the provisions of the statute. For the effective protection of the public, the burden is placed upon the individual to ascertain at his peril whether his act is prohibited by the statute." (63 Cal. App. at pp. 793 and 794.)

In People v. Hernandez, supra, the court cited People v. McCalla as an example of an instance where "culpability has been completely eliminated as a necessary element of criminal conduct in spite of the admonition of section 20 to the contrary." (61 Cal.2d at p.532) The court, however, did not overrule McCalla, but recognized that there were, and dis-

tinguished, situations where the governing statute by implication or otherwise expresses a legislative intent or policy to be served by imposing strict liability. (Id., p. 533. See also, People v. Superior Court (1969) 70 A.C. 129, 138-139; and People v. Wells (1968) 261 Cal.App.2d 468, 478-479.) The Corporate Securities Law is such a statute, and, in other aspects, it has generally been upheld against attacks of unconstitutionality. (See People v. Walberg (1968) 263 Cal. App.2d 286, 295; People v. Rankin (1959) 169 Cal. App.2d 150, 158-159 [cert. den. (19) 362 U.S. 905]; People v. Sears (1956) 138 Cal.App.2d 773, 791-793; and People v. Hoshor (1949) 92 Cal.App.2d 250, 256-257.)

Despite the foregoing rule, if the defendant acted upon misinformation as to the facts, such as information that a permit had been issued permitting him to

transfer shares of stock which had been ordered to be held in escrow, he could not be convicted of having 'knowingly' violated the provisions of the Corporate Securities Law as that term is used in section 26104. (See, People v. Flumerfelt (1939) 35 Cal.App.2d 495, 498-499, distinguishing People v. McCalla, supra. Cf. People v. Sidwell (1945) 27 Cal.2d 121, 126; People v. Marvin (1941) 48 Cal. App.2d 180, 194-195; and People v. Stowell (1941) 45 Cal.App.2d 580, 583-585.) In People v. Sears, supra, the court observed, "The language of the Corporate Securities Law provides an adequate warning as to what conduct comes within its prohibition. [Citations.] The language coveys a sufficiently definite warning from which any person engaging in the business of issuing or selling securities may ascertain whether his business or enterprise has a sanction

of law." (138 Cal.App.2d at p.793) On analysis defendant's complaint is really, not that he has been convicted without proof of mens rea or scienter; but that he has been convicted when he was ignorant of the legal consequences of the acts which he purposefully and willingly committed. The defendant must have known the content of what he promised, and of what he put in writing, and in some manner must have been aware of its character. To paraphrase from a different content: It is not necessary to construe "knowledge that an instrument is a security" as meaning "knowledge that a court would decide that the instrument is a security." (See, People v. Campise (1966) 242 Cal.App.2d Supp. 905, 915 [disapproved on other grounds Flack v. Superior Court (1967) 66 Cal.2d 981, 992, fn. 12]. Cf. People v. Root (1966) 246 Cal.App.2d 600, 606, fn. 5.).

The law under which defendant was convicted is not unconstitutional, nor is it unconstitutional as applied to the facts in this case.

Instructions on the Nature of the Transactions Involved

Defendants most penetrating attack on his convictions is that aimed at alleged improper instruction of the jury with relation to the charges of issuing securities in violation of subdivisions (a) and (f) of section 26104.[19] These charges embraced the transaction with Mrs. Brown,[20] and those involving Barrett, Beyerle, Rhea and Yamashita.

Before counsel argued the case, the court instructed the jury in part, because,

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[19] See footnote 18, supra.

[20] Defendant was separately indicted for violation of section 26104, subdivision (a) in connection with the Brown transaction. The matter was consolidated for trial with the charges reviewed on this appeal, and resulted in defendant's acquittal.

as the judge stated, "... in this case I think that before the arguments begin you should at least know the legal definitions of the offenses charged in these indictments, and one or two other principles of law which I believe will be of assistance to you in analyzing the evidence." The court then gave instructions on the relative duties of the court and jury, on the burden of proof, and on circumstantial evidence. After briefly stating the five charges involving the sale of securities, the court set forth the elements of the offense.[21] It concluded with the follow-

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[21]These instructions read: "Every person who knowingly authorizes, directs or aids in the issue or sale of, or who issues or executes or sells or causes to be issued, executed or sold any security, the issuance, execution or sale of which has not been authorized by a permit from the Commissioner of Corporations of the State of California, then in effect, or in nonconformity with the permit of the Commissioner of Corporations of the State of California, then in effect, is guilty of a public offense.

"The words sale or sell include

ing statement: "The interests in Check-Stop or Check-Stop, Incorporated, which are involved in this case and which are referred to in the five counts of which I am talking were at the time of the alleged transactions, securities within

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every disposition or attempt to dispose of a security or interest in a security for value, and also a contract of sale, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, and a subscription or an offer to sell directly or by an agent or circular letter, advertisement or otherwise.

"To constitute a violation of the Corporate Securities Law which is the law involved in these counts, any conduct which is contrary to the provisions of the law must be knowingly done. The word knowingly as used in this connection imports only a knowledge of the existence of certain facts, which facts bring the act or omission within the prohibition of the statute. It does not require any knowledge of the unlawfulness of such act or omission. Thus, if a person knowingly does any of the things prohibited by the section of the Corporate Securities Law which I have cited, he is guilty of a criminal offense, even though he has no conscious intention to violate the law." (See Corp. Code, former §§ 26104, subds. (a) and (f), and 25009; and People v. McCalla (1923) 63 Cal. App. 783, as discussed in text above.)

the meaning of the word security as that word is used in the Corporate Securities Law of this State." (Cf. Corp. Code, former §§25008, 25100 and 25102.[22] Further instructions dealt with other

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[22] In pertinent part, these sections provided at the time of the alleged offenses as follows: Section 25008. "'Security' includes all of the following: (a) Any stock, including treasury stock; any certificate of interest or participation; any certificate of interest in a profit-sharing agreement; any certificate of interest in an oil, gas, or mining title or lease; any transferable share, investment contract, or beneficial interest in title to property, profits, or earnings...." (Stats. 1951, ch. 825, § 1, p. 2314.)

Section 25100. "Except as otherwise expressly provided in this division the Corporate Securities Law does not apply to any of the following classes of securities: ... (l) Any partnership interest in a general partnership, or in a limited partnership where certificates are executed, filed, and recorded as provided by Sections 15502 and 15525 of the Corporations Code of the State of California, except partnership interests when offered to the public. (m) Any bona fide joint adventure interest, except such interests when offered to the public." (Stats. 1961, ch. 2149, § 19, pp. 4438-4439. Amendment by Stats. 1963, ch. 1046, § 1, p. 2343, effective September 20, 1963, which added subdivision (n) is not applicable to this

charges which are discussed below. The preliminary charge also included a reference to the exemption of partnership interests as created by subdivision (1) of section 25100;[23] and an instruction on the use of evidence of similar offenses, which also is reviewed below.

Substantially identical instructions were repeated following the argument of counsel. The court, however, did insert before the instruction similar to that set forth in the text above, an instruction

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case.)

Section 25102. "Except as otherwise expressly provided in this division, the Corporate Securities Law does not apply to any of the following classes of securities: ... (b) Bills of exchange, trade acceptances, promissory notes and any guarantee thereof, and other commercial paper issued, given, or acquired in a bona fide way in the ordinary course of legitimate business, trade, or commerce." (Stats. 1961, ch. 886, § 32, p. 2344.)

[23]See footnote 22 above.

defining security which was apparently predicated upon the provisions of section 25008.[24]

After the jurors had deliberated a little over two hours, the following questions were submitted to the court:

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[24]This instruction read: "The word security includes any stock, bond, note, treasury stock, debenture, evidence of indebtedness, certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining title or lease, collateral trust certificate, any transferable share, investment contract or beneficial interest in title to property, profits or earnings, guarantee of a security, and any certificate of deposit for a security." (Cf. footnote 22, supra.)

The instructions attacked read: "The securities with which these indictments -- or, rather, the interests in Check-Stop with which these indictments are involved in the Sharon Brown indictment and also in the first four counts of the other indictment, that is, those securities relating to the witnesses Barnett, Beyrle, Rhea and Yamashita, were at the time of the alleged illegal transactions securities within the meaning of the word security as that word is used in the Corporate Securities Law of this State."

"If a partnership sells shares of the partnership to others, are they violating the Corporate Securities Law?"; and "Would like to have reread a portion of the law dealing with Corporate Securities Law in relation to agreements in writing prior to incorporation."

At the time, the defendant requested that "additional instructions should be given from the Corporations Code, setting forth that the sale of partnership interests is not subject to the provisions of the Corporate Securities Law when not offered for the public." The court reread the instruction based on subsection (1) of section 25100 (see fn. 22 above) which contained a reference to the filing of a certificate of partnership.

With respect to the second question, the defendant requested the court to instruct the jury that no instruction had been given specifically referring to

agreements in writing before incorporation. He asked that an additional instruction be given on preincorporation subscription agreements, particularly to the effect that a preincorporation subscription agreement was exempted from the prohibition of the Corporate Securities Law when no consideration passed prior to the time a permit was received from the Division of Corporations.[25] The court advised the jurors

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[25]At a subsequent colloguy with the jury (see text below) the defendant unavailingly elaborated on his request and sought an instruction predicated upon the provisions of Corporation Code section 25153 which provided in pertinent part at the time of the alleged offense, as follows: "(a) No provision of the Corporate Securities Law prohibits subscriptions for shares of a domestic or foreign corporation made prior to the incorporation thereof, ... but each such subscription is made and accepted upon the following conditions: (1) The corporation shall be incorporated ... within 90 days thereafter. (2) The corporation, when incorporated, ... shall with reasonable diligence apply for and secure from the commissioner a permit authorizing the issue of the shares ... in accordance with such subscriptions. (b) Except as is specifically required by any law of this State, nothing in this section permits

as follows: "I will remind you first of all that I instruct you that with reference to the witnesses who are named in the indictment, that is, the witnesses Sharon Brown, Larry Barnett, Mr. Beyrle, Billy Rhea and Yamashita, that the interests involved in those counts were securities as a matter of law." It then referred to the instructions it had given on similar

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any of the following: (1) The collection of any portion of the consideration to be paid on account of subscriptions made prior to incorporation ... unless and until a permit has been issued by the commissioner authorizing such collection. (2) The taking of subscriptions for any security of any company other than a domestic or foreign corporation ... or collection of any portion of the consideration to be paid on account of such subscriptions, unless and until a permit has been issued by the commissioner authorizing the taking of such subscriptions or the collection thereof." (Stats. 1961, ch. 1976, § 2, p. 4170. Amendment by Stats. 1963, ch. 1533, § 1, p. 3118, which substituted "securities as defined in section 25008 of this code", for "shares", was effective after the incorporation of defendant's business.)

and observed, "Now, by your question, I don't know whether you're directing that to those transactions as to which you have to make the determination as to whether they constituted offenses or not, or to the transactions which are named in the indictments." The court continued, "I will instruct you, however, as to the instructions where you have to determine whether they constitute offenses or not, on the definition of the word 'security' as I previously read it to you, and that is as follows: [There followed the first instruction set forth above in footnote 24]." The foreman indicated that the court had interpreted the reason for the question correctly, and that there were then no further questions other than the re-reading of the indictment in the Brown case. This was done and the jury retired and was conducted to dinner.

A little over two hours later the

court called the jury in to discuss what the jurors wished to do about further deliberations. The foreman indicated that the jury could conclude its deliberations if the court would clarify ~~the law on~~ the point of "what constitutes a violation of the Corporations Code in regard to selling of an interest in a business that isn't incorporated?" In response the court repeated the instruction defining "security" (see fn. 24, supra).

After a brief recess to discuss defendant's contention that an instruction should be given embodying the terms of section 25153 (see fn. 25, supra), the jurors returned with a written question which has not been made part of the record, but which was described by the court as follows: "... your last question which you drew up after you last retired to the jury room is divided in two parts. It relates to the law on

selling a limited partnership or an interest in a business." The court instructed the jury, "It is not unlawful to sell an interest in a partnership if certain legal requirements are complied with. If those requirements are not complied with, then it is unlawful to sell an interest in a limited partnership. The requirements that must be complied with are these; and I'll read this instruction to you again," and followed with the instruction based on subsection (1) of section 25100 (see fn. 22 above). The court continued, "Now, the second part of your question relates to selling an interest in a business, and I will instruct you in that connection as follows: That the sale of an interest in the title of property, profits or earnings of a business, without a permit from the Commissioner of Corporations is a violation of the Corporate Securities Law." After an inqui-

of further deliberation the jury retired for the night. The verdicts were returned after three hours of further deliberation the following morning.

Defendant's principal contention is that it was error to instruct the jury that each of the interests in Check-Stop which were involved in the five charges under consideration was a security as a matter of law. He also asserts not only that the court failed to properly instruct the jury with respect to partnership interests (see fns. 24 and 25 supra) and preorganization agreements (see fn. 25 above) but now, for the first time, also avers that the court erred in failing to instruct on its own motion concerning the exemption of joint venture interests under subdivision (m) of section 25100 (see fn. 22 above), concerning the right of a person to sell stock for his own account (§ 25152),[26]

and concerning the right to secure a permit to transfer securities held in escrow.[27] In fact he insists that the evidence shows as a matter of law that some of the transactions for which he was convicted were not in violation of the Corporate Securities Act.

Resolution of these questions involves further analysis of the

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[26]Corporations Code, former section 35152, provided: "Except as expressly provided in this division, the Corporate Securities Law does not apply to the sale of securities when (a) made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of the securities, disposes of his own property for his own account, and (b) the sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of the security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of the Corporate Securities Law."

[27]See Corporations Code former sections 25308, 25508, 25513 and California Administrative Code, Title 10, former sections 407 et seq., particularly section 419.

principles upon which defendant relies and the manner in which they apply to the facts as developed by the evidence.

"As a general rule, the sale of 'securities' that is condemned by the courts involves an attempt by an issuer to raise funds for a business venture or enterprise; an indiscriminate offering to the public at large where the persons solicited are selected at random; a passive position on the part of the investor; and the conduct of the enterprise by the issuer with other people's money." (Dahlquist, Regulation and Civil Liability Under the California Corporate Securities Act (1945) 33 Cal. L. Rev. 343, 360.) Defendant relies upon the imprimatur placed upon the foregoing quotation in Silver Hills Country Club v. Sobieski (1961) 55 Cal.2d 811, 815 to establish that the regulatory statute should not be construed to apply

to the relatively private transactions which furnish the basis for his conviction on four of the five charges involving violation of section 26104. In the same case the court noted, "Section 25008 defines a security broadly to protect the public against spurious schemes, however ingeniously devised, to attract risk capital. [Citation.] To effectuate this purpose the courts look through form to substance. [Citations.]" (55 Cal.2d at p. 814.) In the same article the author expressed the view that "...since the Act is designed primarily to protect the public from exploitation in the field of security sales, it is believed that a total absence of a public offering has an important evidentiary bearing in determining what constitutes a 'security' in certain borderline cases, particularly in the case of partnership

interests." (Dahlquist, op.cit.,33 Cal. L.Rev. 359.) At the same time he acknowledged, "It is true that the Act has always required a permit for the issuance of a corporate security even though a single private transaction is involved and there is no public offering." (Id.) Defendant cannot escape liability because he made no offer to sell interests in his business to the general public.

"Whether a written agreement constitutes a security within the Corporate Securities Law is a question of law and reviewable as such by an appellate court. (People v. Dutton, 41 Cal. App.2d 866, 872, 873 ...)" (People v. Miller (1961) 192 Cal.App.2d 414, 418. In addition to case cited, see People v. Marvin, supra 48 Cal.App.2d 180, 192-193; and People v. McCalla, supra, 63 Cal.App. 783, 792-793.) The following principle is

People v. Woolson (1960) 181 Cal.App. 2d 657, 671.)

The law provides that "the substance and not the mere form of the transaction determines its character." (People v. Sidwell, supra, 27 Cal.2d 121, 128.) Consequently, where there is conflicting evidence as to the nature of a transaction, the question of whether it is within the proscription of the law is one of fact. (Id. at p. 129. See also, Weinstock v. L.A. Carpet Inc., supra, 234 Cal.App.2d 809, 815; People v. Clark (1963) 215 Cal.App.2d 734, 738; Rivlin v. Levine, supra, 195 Cal.App.2d 13, 20; People v. Woolson, supra, 181 Cal.App.2d 657, 672.)

Defendant properly contends that the existence of conflicting evidence concerning the nature of the transaction necessitates that the jury be adequately instructed as to the alternative decisions

open to them. (See People v. Wilson (1967) 66 Cal.2d 749, 759; People v. Roth (1964) 228 Cal.App.2d 522, 527; and People v. Burns (1948) 88 Cal.App.2d 867, 871.)

Count I - Barnett

The instrument given to Barnett on December 24, 1962 in return for $2,000 read as follows: "Agreement - It is hereby agreed that upon receiving from James L. Barnett the sum of $2,000.00, that he receive his four percent of the business known as Check-Stop. Upon Check-Stop breaking even in operations, Barnett will receive one percent addition of the business. Signed, Clifford L. Locke, dba Check-Stop." At bore the endorsement, "Received from James L. Barnett this 24th day of December 1962, the sum of $2,000.00. Clifford L. Locke dba Check-Stop."

The court correctly instructed the

jury that the foregoing instrument was a security as that word was used in the Corporate Securities Law. It clearly referred to a "beneficial interest in title to property, profits, or earnings." (Sec. 25008, fn. 22 above; People v. Oliver (1929) 102 Cal.App. 29, 36; and see People v. Miller, supra, 192 Cal. App.2d 181, 418, and cases cited above.)

Defendant's contentions that the facts show that the agreement was a preincorporation agreement sanctioned by law, and that in any event the trial court erred in failing to permit the jury to so find under proper instructions are not meritorious. Under section 25153 (fn. 23 above) no consideration may be paid or received until the enterprise is incorporated and a permit for the issuance of shares is secured. (People v. Turner (1962) 58 Cal.App.2d 141, 144; People v. Ortleman (1955) 134 Cal. App.2d 183, 190 and Miller v. Lutz

ornia Roofing Co. (1942) 55 Cal. App. 2d 130, 141.) The enterprise was not incorporated and a permit for the issuance of shares was not obtained until April 1963. Although such a delay may not be fatal (Sargent v. Coppage (1941) 47 Cal.App.2d 122, 125), the subsequent issuance of a permit, in the absence of special circumstances, did not validate the prior illegal transfer of consideration. (Miller v. California Roofing Co., supra, 55 Cal.App.2d 130, 141-142; and see Smith v. Turner, supra, 238 Cal. App.2d 141, 149-150.)

In Sargent v. Coppage, supra, without discussion of the prohibition against the transfer of any consideration prior to the issuance of a permit, the court approved findings that the preliminary agreement under which the plaintiff had paid $1000 for a four percent interest in some mining claims was

a temporary expedient only, and was recognized by the parties as being made for the sole and only purpose of providing a record of the interests of the parties thereto pending the formation of the corporation.'" (17 Cal.App.2d at p.125. See also, Hargiss v. Royal Air Properties, Inc. (1962) 206 Cal.App. 2d 406, 409-410; and People v. Staver (1953) 115 Cal.App.2d 711, 722.)

The last mentioned cases fall within the more general rule recognized in subsections (l) and (m) of section 25100 (fn. 22 above), and articulated in People v. Syde, supra, 37 Cal.2d 765 as follows: "It is settled that the corporate Securities Law was not intended to afford supervision and regulation of instruments which constitute agreements with persons who expect to reap a profit from their own services or other active participation in a

business venture. Such contracts are clearly distinguished from instruments issued to persons who, for a consideration paid, stipulate for a right to share in the profits or proceeds of a business enterprise to be conducted by others; and the court will look through form to substance to discover whether in fact the transaction contemplates the conduct of a business enterprise by others than the purchasers, in the profits of proceeds of which the purchasers are to share. [Citations.]" (37 Cal.2d at p. 768. See also, Austin v. Hallmark Oil Co. (1943) 21 Cal.2d 718, 727; Weinstock v. L.A. Carpet, Inc., supra, 234 Cal. App.2d 809, 813; People v. Clark, supra, 215 Cal.App.2d 734, 742; Rivlin v. Levine, supra, 195 Cal.App2d 13, 21-24 and 24-25; People v. Miller, supra, 192 Cal.App2d 414, 418-419; Farnsworth v. Nevada-Cal Management, supra, 188 Cal.App2d 382,

386-390; People v. Woolson, supra, 181 Cal.App.2d 657, 669-670 and 671-672; People v. Smith (1960) 180 Cal.App.2d 420, 424-425; People v. Mills (1958) 162 Cal.App.2d 840, 845; People v. Jaques (1955) 137 Cal.App.2d 823, 833-836; Oakley v. Rosen (1946) 76 Cal.App.2d 310, 312-314; and McSherry v. The Market Corporation (1933) 129 Cal.App. 330, 332-334.) Defendant's contentions, in the alternative, that the evidence shows a partnership or a joint venture as a matter of law, or, that in any event the jury should have been properly instructed on the effect of Barnett's participation in the venture must be evaluated in the light of the foregoing authorities. It may be noted that the statute (§ 25100, subds. (l) and (m) does not, as do some of the cases, state that an interest in a partnership or a joint venture is not a security, but

merely provides that the Corporate Securities Law does not apply to such interests. Therefore, unless the issue can be resolved from the evidence as a matter of law, the crucial point of defendant's argument is the failure of the court to apprise the jury of the effect of Barnett's participation in a joint venture or partnership.

"Where the determination whether a relationship is a joint venture requires the court to choose between opposing inferences as to the intentions of the parties the question becomes one of fact; but the relationship in this case arose solely from the written agreement, which clearly discloses the intentions and understanding of the parties; therefore, under ordinary rules governing the interpretation of written contracts, the question whether a joint venture was created is one of law. [Citation.]"

(People v. Miller, supra, 192 Cal.App. 2d 414, 418. See also, People v. Woolson, supra 181 Cal.App. 2d 657, 669; and Oakley v. Rosen, supra, 76 Cal.App. 2d 310, 312.)

Defendant asserts that Barnett was a joint venturer or a partner because he was employed in a managerial capacity, and under the terms of his employment his financial remuneration would depend on his efforts and the success of the business. This argument completely overlooks the uncontradicted fact that the terms of Barnett's actual employment were arranged and in effect prior to the time arrangements were made for him to invest in the business. Although he previously had given defendant some advise in connection with the establishment of the enterprise, he did not bargain for any interest in connection with those services. He did not join in

creating the business. (Cf. Austin v. Hallmark Oil Co., supra, 21 Cal.2d 718, 726-727; Weinstock v. L.A. Carpet, Inc., supra 234 Cal.App.2d 809, 813; Hargiss v. Royal Air Properties, Inc., supra 206 Cal.App.2d 406, 410; People v. Miller, supra, 192 Cal.App.2d 414, 418-419; Oakley v. Rosen, supra, 76 Cal. App.2d 310, 313-314; and McSherry v. The Market Corporation, supra, 129 Cal.App. 330, 332.) Nor was his investment part of a bargain whereby he was to render services and so secure a return commensurate with his participation in the enterprise (cf. People v. Syde, supra, 37 Cal.2d 765, 769). Arrangements for the employment of the purchaser of an interest in an enterprise do not establish such participation in the conduct of a business as to exempt a sale of an interest to such employee as a matter of law. (People v. Clark, supra, 215

Cal.App.2d 734, 750-751; People v. Smith, supra, 180 Cal.App.2d 420,424-425; People v. Mills, supra, 162 Cal.App.2d 840, 850-851; People v. Jaques, supra, 137 Cal.App.2d 823, 833-836. See also People v. Woolson, supra, 181 Cal.App. 2d 657, 672-673.)

The following observations are pertinent with respect to defendant's claim that there was evidence of a partnership or joint venture. "The trial court was justified in reaching the conclusion that no bona fide limited partnership was formed. 'The understanding or misunderstanding of the parties as to the nature of the transaction is not determinative of its legal effect.' " (People v. Sidwell, 27 Cal.2d 121, at p. 126...) There was present no element of mutual selection of those who would constitute the membership of the partnership; rather, Levine went about among his

relatives, friends and acquaintances seeking those who would invest in his enterprise in return for a share of the contemplated profits. Those who were called limited partners never met together but, whether they were individuals or groups of investors, one by one they were designated by Levine as money for the venture was forthcoming from time to time. In State v. Simons, 193 Ore. 273, the court said at pages 291-292 ...; 'It is argues that, because of evidence that defendants intended at some future time to organize the subscribers as a limited partnership under Oregon law, we must construe the Securities Law with that fact in view. The weakness of the argument lies in the fact that we are not considering the actions of a group of persons voluntarily associated together in a joint venture, but rather a sale of securities to persons indiscriminately

selected and having no bond of union other than the fact that they had money and the gambling instinct....The use of the provisions of the Limited Partnership Act ... as a cloak to legalize the acts of the defendants in this case is an inadmissible expedient.' While in a sense the intentions of the defendants in the present case appear to have been innocent, their acts were deliberate and 'it is by their acts and the language of the Corporate Securities Act that we must judge the legal consequences of those acts and the sufficiency of the evidence to sustain the judgment.' (People v. Sidwell, supra, 27 Cal.2d 121, at p. 126.)"' (Rivlin v. Levine, supra, 195 Cal.App.2d 13, 23-24.)

"In our case, the agreement was that Weaver was to receive stock and to work for the corporation as vice president or secretary. The Gopher Tire case (supra,

177 N.W. 937) indicates that where the corporation can operate just as well without the services of the one agreeing to buy stock, the agreement comes within the terms of the Blue Sky Law. (See 25 S.Cal.L.Rev., p.210.) Applying that test here, it appears that the proposed corporation when formed could operate without Weaver. While there was some discussion of his helping in the advertising of the proposed corporation and in the selling of stock, his services were not indispensable. His participation either before or after incorporation was not to be the active participation which would make the enterprise a joint adventure, or would make the agreement any the less an 'investment contract' or an agreement to buy corporate stock." (People v. Jaques, supra, 137 Cal.App.2d 823, 836.)

The last quoted cases each involved

the questions of the sufficiency of the evidence to sustain a finding that there was not sufficient participation to bring the transaction within the purview of the exemption conferred by section 25100 and People v. Syde, supra, and related cases. The principles, however, control in this case. The evidence upon which defendant relies fails to show such participation by Barnett as would sustain a finding of a joint venture or a partnership. There was, therefore, no error in failing to further instruct the jury on those issues with respect to the transaction in the first count.

For the same reason there could be no prejudicial error in the instruction of the court which directed the jury that a limited partnership would only be exempt if a certificate were filed and recorded as required by law. (See fns. 24 and 25

above.), Defendant relies upon Farnsworth v. Nevada Cal Management, supra, which concludes: "It is apparent to us that section 25100, subdivision (m), [later subdivision (l)] is using the phrase 'in a limited partnership where certificates are executed, filed, and recorded as provided by Section 2478 or Section 2501 of the Civil Code,' is defining a legally constituted limited partnership and that the background thought of the legislators was that any abortive attempt to form such an organization results in a general partnership and no more need be said on the subject. Thus all types of partnerships are exempt from application of the Corporate Securities Law provided the interests therein are not offered to the public. It appears without contradiction and the court found there was no such offering; it was conceded on oral argument that

there was no intent to make such an offering. Appellants would give the statute a literal interpretation which is not consistent with the fundamental purpose of the Corporate Securities Law, namely, the protection of the public. When there is to be no public offering there is no real prupose for the filing and recording of the partnership certificate to perform so far as the securities law is concerned." (188 Cal.App.2d at pp. 386-387.) If the court erred in instructing the jury that filing and recording were necessary when there was no evidence of a public offering, that error was not material in the Barnett transaction, because unlike Farnsworth, there was not sufficient evidence to show any attempt to form a limited partnership.

No prejudicial error is found in the instructions as applied to the

evidence in the Barnett transaction.

Count II - Beyrle

On October 28, 1963, Beyrle gave defendant his check for $7,200. According to Beyrle this sum was to be evidenced by a noninterest bearing promissory note which would be paid off in 60 days. In addition, Beyrle was to receive 51 percent of Check-Stop and a 25 percent interest in Locke Detective Agency. The check was immediately deposited and the proceeds were disbursed to pay pressing claims against the business. Handwritten documents which embodied the terms of the agreement were replaced by a note and agreement prepared by Beyrle's attorney about a week later and given the date of the original transaction.[28]

[28]This agreement reads as follows:
"This agreement is made on October 28, 1963, between THOMAS A. BEYRLE and

Here again the court properly instructed the jury that the agreement, under which the defendant purported to convey an interest, not only in Check-

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CLIFFORD J. LOCKE.

"Said BEYRLE agrees to loan under terms established in a Promissory Note, executed this day between the parties, the sum of Seven Thousand Two Hundred Dollars ($7,200.00).

"In consideration thereof, said LOCKE agrees to immediately give to said BEYRLE, without condition or reservation, fifty-one percent (51%) of the outstanding common stock of CHECK-STOP, INCORPORATED, a California corporation, and twenty-five percent (25) of the outstanding common stock of LOCKE SECURITY, INCORPORATED, a California corporation.

"Said LOCKE agrees to invest a minimum of Five Thousand Dollars ($5,000.00) cash in the operations of CHECK-STOP, INCORPORATED by December 27, 1963.

"The parties agree that said BEYRLE is to assume the active direction of the activities of CHECK-STOP, INCORPORATED, at any time after the present date that he desires to.

"Executed this 28 day of October 1963, at Oakland, California.

/s/ Thomas A. Beyrle

/s/ Clifford J. Locke."

Stop, but also in his detective agency, was a security. Defendant asserts that the facts would have permitted the jury to find that the transaction was a joint venture or partnership arrangement, and the admitted fact that it was contemplated that Beyrle would take over control of the corporation and assume managerial duties permits, if it does not compel, the application of the doctrine enumerated in People v. Syde, supra, and related cases. (See, 37 Cal2d at p. 768, and text above.) This contention disregards the facts that the enterprise was already in existence, and that no consideration could be received for the stock in escrow until a permit was secured from the Corporation Commissioner. (See text below.) Under these circumstances the promise to make the investor a managing participant does not serve to purge the transaction of the stigma

imposed by law. In People v. Mills, supra, the court ruled, "The contention that the status of Meng and Shrader as corporate directors and officers precludes the application of the general rule cannot prevail. The point made by appellant is that the venture could not function without the active participation of Meng and Shrader because they were to be two of four directors, and all company checks were to be signed by one of them; hence without their consent no money could be spent and no board action taken. The rule that where 'the assignee [buyer] is to share in the conduct of the enterprise, the instrument representing an assignment of a fractional interest ... is not a security within the act' (quoting Austin v. Hallmark Oil Co., supra, 21 Cal.2d 718, at 727), did not arise from any such corporate internal situation,

nor was it intended to apply thereto. The doctrine grew out of the necessity of determining what is an investment contract or a certificate of interest or a participation in an unincorporated venture, such as a real estate subdivision, an oil well, a mine, or the like. [Citations.] To apply it to a sale of corporate stock would open a broad avenue for safe evasion of the statute in cases of small operations. It would be necessary only to make the buyers corporate officers and directors with a controlling vote and sales of the company stock could be made without a permit and with impunity. Many a rascal would relinquish control of a speculation for cash in hand. Such an interpretation of the law would permit most closed corporations to issue stock without consulting the Commissioner of Corporations and later to resell the same to members

of the public." (102 Cal.App.2d at pp. 850-851. See also, People v. Clark, supra, 215 Cal.App.2d 734, 747-748.)

Nor can the defendant claim that the transaction was legal because he was merely selling his own stock for his own account. (See § 25152, fn. 20 above.) In the first place, the shares were to be transferred in consideration of sums advanced to the corporation in return for the corporation's note. In Bellerue v. Business Files Institute, Inc. (1964) 61 Cal.2d 488, the court construed the provisions of section 25152, and concluded as follows: "It is clear that plaintiff lent the $2,500 to B.F.I. because of the incentive to gain the stock in B.F.I. and thereby participate in its profits, it being undisputed that the sale of B.F.I. stock by C.M.C. was conditioned on plaintiff's loan and that the loan was conditioned on plaintiff's

being able to obtain the stock. Under the circumstances, the loan and the sale of stock were a single, integrated bargain which constituted, in effect, a sale by S.I.C. Accordingly, the agreement between the parties was an investment contract amounting to a security sold by, or for the benefit of, the issuer, and a permit was required." (61 Cal.2d at p.490. See also, People v. Stidwell, supra, 27 Cal.2d 121, 127-128; Conrad v. Superior Court (1962) 209 Cal.App.2d 143, 148-150; People v. Smith, supra, 180 Cal.App.2d 420, 424; People v. Mason (1948) 86 Cal.App.2d 445, 454-455; Smith v. Randall (1942) 51 Cal.App.2d 195, 197-198; and People v. Marvin, supra, 48 Cal.App.2d 180, 194-195.)

In Davis v. Acware Plastics (1953) 116 Cal.App.2d 798, upon which defendant relies, the individual seller held his stock free of any permit restrictions on

its transfer. The sales price of the stock was paid directly to the owner of the stock. There was no proof of any binding agreement which requires the seller to loan the funds received to the corporation, although it was recognized that this might be, and in fact it was, done. The court affirmed a judgment upholding the sale and observed, "That he loaned the corporation the $5,000 which he obtained from the sale of his private stock does not ipso facto make the sale one for the benefit of the issuer of the security. That is a question of fact which the trier of fact has decided adversely to appellant. There is ample evidence to sustain the finding that the sale was a bona fide sale of Gummo's personal stock and that it was not made for the direct or indirect benefit of the issuer or the direct or indirect promotion of any scheme or enterprise.

with the intent of violating or evading any provision of the California Corporate Securities Law." (116 Cal.App.2d at p. 801.) No such facts were adduced in this case.

Secondly, Locke's shares were held in escrow under a permit which read in part, "the owner or persons entitled to said securities shall not consummate a sale or transfer of said securities, or any interest therein, or receive any consideration therefor, until the written consent of said Commissioner shall have been obtained so to do." Defendant's reliance on Russell v. Ruffcorn, (1933) 132 Cal.App. 215 is misplaced. In that case the court did say, "We therefore hold that irrespective of whether or not the Commissioner of Corporations had a right to impound the individual stock of Owen Ruffcorn as a condition precedent to the sale of the treasury

stock by the corporation, the revocation of the permit operated to remove the restriction placed upon Ruffcorn and Evans to sell their individual stock." (132 Cal.App. at p. 229.) The facts reflect, however, that the individual stock had been validly issued free of any conditions before it was impounded in escrow as a condition of a permit granted to the corporation to issue and sell more stock. The latter permit was revoked and never renewed so the court held that the stock of the individuals reverted to its original status. Furthermore, the Supreme Court in denying a hearing stated, "... we withhold approval of that portion of the opinion which declares that the revocation of the permit automatically released the impounded stock." A hearing was denied because the fact that the plaintiff was in pari delicto precluded granting him relief in a civil

suit under the doctrine promulgated in Domenigoni v. Imperial Live Stock etc. Co. (1922) 189 Cal. 467, 475-476. (132 Cal.App. at p. 232.)

In this case Locke's stock was never freed of the escrow and the conditions imposed by the permit under which the stock was issued to him. The expiration of the permit on October 10, 1963, prior to the Beyrle transaction, did not release Locke's stock or the other shares held in escrow from the condition set forth above, but merely precluded the issuance of further stock, if any, that might have been authorized but not then issued under the permit.[29]

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[29] The permit provides in part: "(b) That unless revoked or suspended, or renewed upon application filed on or before the date of expiration specified in this condition, all authority to sell securities under paragraph 1 of this permit shall terminate and expire on October 10, 1963. All other paragraphs and/or conditions of this permit, if any, shall remain in full force and effect until revoked, suspended or amended by order of the Commissioner."

so advise the jury. This approach falls of its goal because the consideration was paid and received before any permit was obtained for the transfer of the escrowed shares. Furthermore, as in Bellerue v. Business Files Institute, Inc., supra, the consideration for the agreed transfer was to flow to the corporation and the provisions of section 2112 do not validate the transaction.

Defendant asserts that no value was given for the agreement to transfer shares to Rhea. The jury was correctly instructed that a sale under the act involved a disposition or attempt to dispose of a security or interest in a security for value. (See fn. 2, supra, and cf. § 25009, subd. (a).) There was testimony from which the jury could find that the $2,000 by which the note exceeded the cashier's check was left on the note to memorialize the obligation to

195; and note text above on constitut ionality of the statute.) The permit for the issuance of further new stock had expired in October, in fact it had previously served its purpose when all shares authorized had been issued and placed in escrow. Defendant again fails to distinguish between the permission granted the corporation to issue shares which expired, and the prohibition against transferring existing issued but escrowed shares, which continued. There was no material mistake of fact. The defendant erred if he believed he could freely receive for himself or the corporation the consideration sought for a transfer of the shares. This error, as has been demonstrated, did not relieve him of responsibility of his purposeful and wilful acts.

No error of omission or commission is found in the instructions as applied

to the Rhea and Yamashita transactions, and the evidence is sufficient to sustain the convictions predicated thereon.

False Statements

Defendant was convicted of violation of subdivision (b) of section 26104 (see fn. 18 above) because he knowingly made false statements and representations concerning the offers of securities of the corporation, and its financial condition and other affairs in a statement filed with the Commissioner of Corporations.

The financial statement submitted with Check-Stop's application set forth various liabilities of Check-Stop including debts of $22,000 to Dr. Connelly, $2,200 to Langner and $2,000 to Barnett. As of December 21, 1962, the date of the balance sheet, Dr. Connelly had a 50 percent ownership interest. There were also outstanding, on this date, interests held by Mrs. Morelli (10%) and Mr.

Jongewaard (3% with an option for an additional 7% not mentioned in any document filed).[30] In addition, Check-Stop owed some $14,000 to Redwood Factors as of December 26, 1962. The balance sheet was prepared by Mr. Rocksvold, an accountant, from the books of Locke Detective Agency and Check-Stop, and from information furnished by defendant. There was considerable commingling of funds, and Rocksvold's information as to which liabilities belonged to which business came from defendant.[31]

Defendant claims that the statement

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[30] It should also be noted that defendant had at least two "personal" loans outstanding on this date - those made from Sharon Brown and Mary Haynes, that the $2,000 "debt" to Barnett was an ownership interest, and that Langner had an option to purchase 25 percent.

[31] Defendant testified that he considered Check-Stop, Locke Detective Agency and himself essentially equivalent and transferred funds freely from one to the other.

was not in fact false, and that in making up the statement dated December 31, 1962, he was morally and legally free to select from the assets and liabilities which were attributable to Check-Stop, to his detective agency, and to his personal affairs, those items which he desired to attribute to the Check-Stop business as it was to be incorporated. He further asserts that any error in the statement was a mistake of fact which would relieve him of criminal liability.

Defendant asserts that the Morelli obligation was properly carried on the books of the detective agency, and that he was under no obligation to report the interest in the business he had promised Mrs. Morelli because it was contingent on his failure to pay the debt, and in any event would be satisfied out of his personal stock. Since the Morelli funds were advanced after discussing the Check-

Stop business, and the $7,000 note subsequently given refers to "Locke, dba Check-Stop," the jurors were entitled to find that it should have been included in the liabilities of the business. Locke could not claim unconditional ownership of his interest in the business if it was in fact already encumbered.

Defendant's argument that Mrs. Morelli and Jongewaard had no interest in the business because it was contemplated that further papers would be drawn up must be rejected. Its approval would reward the defendant for failing to do what he undertook to perform, and leave him unaccountable for the fruits of his questionable activities. His assertion that these investors abandoned their interest founders on conflicting testimony with relation to the question of whether the promised interests ever terminated until discharged as contemplated

or by extrinsic agreement.

The indiscriminate allocation of items between the Check-Stop business and Locke's personal and other business accounts cannot be sanctioned. The application for the permit called for "An itemized account of applicant's financial condition, setting forth the amount and character of its assets and liabilities." (See § 25502.) The failure to show existing liabilities and interests gave a distorted picture of the financial condition of the enterprise.

Nor can the defendant claim that he was ignorant of the true facts. The accountant's testimony indicates that he relied on Locke for the information concerning the nature and amount of the financial data of the enterprise which was incorporated into the original corporate financial statements. Locke knew of the prior transactions in which he had en-

gaged. It can only be inferred that he failed to properly disclose them to his accountant.

Finally, defendant, in reliance upon People v. Boggess (1924) 194 Cal. 212, claims that the offense, if any, was committed in San Francisco where the application was filed. In Boggess the court upheld prosecution in Sacramento County where the application was ultimately filed and considered, although it had been actually delivered to the commissioner's office in San Francisco. (194 Cal. at pp. 218-220.) The court relied on the provisions of Penal Code section 781[32] and concluded: "... the defendant was properly prosecuted in

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[32]Section 781 now reads: "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory."

Sacramento county where the crime was in part committed and ultimately consummated." (194 Cal. at p. 220.) Boggess does not preclude prosecution of the offense in any county where the crime was in part committed. The record shows that the application, directed to the Commissioner of Corporations, was executed and verified before a notary public in Alameda County. In People v. Malloy (1962) 199 Cal.App.2d 219 [disapproved on other grounds in People v. Kelley (1967) 66 Cal.2d 232, 244], this court ruled "Under the latter section the county in which preliminary arrangements for the commission of a crime are made, is a proper county in which to prosecute the completed offense, although the acts performed there did not constitute an essential element of the crime [Citations.]" (199 Cal.App. 2d at p. 225. See also, People v. Twedt (1934) 1 Cal.2d 392, 397.)

No error is found in defendant's conviction under the Fifth Count.

Grand Theft - Beyrle

Defendant attacks his conviction of grand theft which is predicated on the transaction under which he received $7,200 from Beyrle on the grounds that the evidence was insufficient to sustain the charge because the alleged representations were, in fact, true, and because there was, in fact, no reliance on them. He further asserts that there was no corroboration of the alleged false promise to repay the $7,200; that the court prejudiced him in permitting evidence of other transactions; and that the court erroneously instructed the jury on the nature of the other transactions and their relationship to the crimes charged. The other transactions are discussed below as they affect all of the offenses charged and proved. He

also claims that he has been improperly subjected to double punishment, in violation of section 654 of the Penal Code, by virtue of his convictions for both grand theft and violation of the Corporate Securities Law for the same transaction.

The jury was properly instructed concerning the requisites to prove grand theft predicated upon false pretenses.[33]

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[33]These instructions, as given before argument, read: "Every person who knowingly and designedly by any false or fraudulent representation or pretense defrauds another person of money or of real or personal property is guilty of theft by false pretenses. In order to find a defendant guilty of theft by false pretenses, each of the following elements must be proved:

"First, that the defendant made or caused to be made by word or conduct a false representation or pretense of an existing or past fact known by him to be false, or a promise without an intention to perform it.

"Second, that the representation or promise was made by the defendant with the specific intent to defraud the owner of his property.

"Third, that the false representation or promise was believed and relied upon by the owner, and was a material cause of inducing him to part with his

money or property. But the false representation or promise need not be the sole cause.

"Fourth, that the fraud was accomplished in that the owner parted with his money or property, intending to divest himself of title.

"A person commits theft if by misrepresentation of facts or false pretenses he purposely deceives another and induces him to part with the ownership of his property. A false promise made by a person who actually does not intend to keep it is a false pretense and may be the means of committing theft.

"A false statement of fact may be the means of committing theft only if the person making the statement knew that it was false or knew that he had no information which would justify him in a belief that it was true.

"A misrepresentation of fact does not necessarily require words; it may result from conduct intended to deceive by creating a false impression.

"Upon a trial for having with intent to cheat and defraud another designedly by any false pretense obtained from any person any labor, money or property, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense or some note or memorandum of it is in writing subscribed by or in the handwriting of the defendant, or unless the pretense is proved by the testimony of two witnesses, or that of one witness and corroborating circumstances." They were repeated in substantially the same form after argument.

Defendant relies on the principle found in the following statement: "To establish the commission of the crime of grand theft sounding in false pretenses, it must be proved that: the defendant made false representations of past events or existing facts, as distinguished from a mere expression of opinion or promise of future action; ..." (People v. Hambleton (1963) 218 Cal.App.2d 479, 481. See also, People v. Reese (1934) 136 Cal. App. 657, 663-664; and People v. Staver, supra, 115 Cal.App.2d 711, 716.) The question of whether a false promise can form the basis of theft based on a false pretense was extensively reviewed in People v. Ashley (1954) 42 Cal.2d 246. The court rejected the narrow view taken in People v. Reese, supra, and other cases, and approved the principle "that a promise made without intention to perform is a misrepresentation of a state of

mind, and thus a misrepresentation of existing fact, and is a false pretense within the meaning of section 484 of the Penal Code." (42 Cal.2d at p. 262. See also, People v. Weitz (1954) 42 Cal. 2d 338, 343; People v. Otterman, supra, 154 Cal.App.2d 193, 204; and People v. Staver, supra, 115 Cal.App.2d 711, 720.)

The testimony of Beyrle indicates that defendant represented that he owned and controlled approximately 90 percent of the stock; that there was $9,000 due the corporation under a contract with Lucky Stores and that it would be immediately renewed if Check-Stop were in business; and that the Marine Cooks and Stewards Union owed him $10,000 for detective work which would be due as soon as the union elections were over.

The defendant states that the attorney for the corporation held in escrow a certificate issued to Locke for 92

percent of the shares authorized to be issued, and that therefore there was no misrepresentation concerning the stock. Beyrle admittedly was advised that Locke's shares were held in escrow by the attorney. He denied that he knew that the consent of the Corporation Commissioner was necessary to effect a transfer; and he testified that he understood that Locke was free to transfer them. Beyrle was not advised of Locke's prior commitments to transfer 10 percent to Mrs. Morelli, of the option given to Langener for 25 percent, or of the possible interests of Mrs. Brown in 10 percent and McGowan in 18 percent. The jury could find that Locke only held from 29 percent to 57 percent that was not committed to others. Although Beyrle expected and requested an immediate transfer of the shares, they were never transferred to him.

According to a letter written by Locke in March 1963, the agreement with Lucky Stores was drafted to provide: "In the event that Check-Stop does not stop or reduce the check losses in excess of $9,000 then there would be no charge for the year service." Beyrle was not apprised of this provision, and the evidence permits the inference that Locke evaded showing the investor a copy of the contract. Moreover, there was no commitment from Lucky Stores that the contract would be renewed. Defendant contends that he reasonably believed that Check-Stop had reduced the customer's losses, and that his statement was only a matter of opinion. The falsity, however, was in misrepresenting the terms of the contract which in turn gave a false picture of the client's obligation.

The evidence shows that for services rendered from September 1962 through June

1963 Locke was paid almost $12,000 by the union, and that the last payment was made in June 1963. There was no record of any further services rendered or accounts owing. Defendant denied that he made any representation concerning money due from the union.

The statements made by Locke were not mere matters of opinion. (See People v. Staver, supra, 115 Cal.App.2d 711, 717-720.) Their falsity being established, it is unnecessary to further pursue the question of whether any of defendant's promises to repay the $7,200, to transfer 51 percent of Check-Stop and 25 percent of his detective agency to Beyrle, and to himself invest an additional $5,000 in the business by December 27, 1963 was made without the intent to perform it.

Beyrle testified that he parted with his money in reliance on defendant's

representations that he owned 90 percent of the corporation; in reliance on defendant's promise that he would transfer control of the corporation; in reliance on the representation that $9,000 was due and owing from Lucky Stores; and in reliance that the accounts payable were around $35,000, as shown on the financial statement given him by Locke. He stated that he would have investigated further before paying over the money if Locke had not represented that the phones were to be disconnected at noon.

Beyrle acknowledged that Locke told him he was a bad manager, that the enterprise could not meet its immediate obligations and he was "desperate for money to keep the company going ... for a certain period till these other moneys came in." Beyrle also indicated that he discounted the value of the assets on the financial statement, and made his

own appraisal of their value. It was also developed that Beyrle considered himself a sophisticated investor. These facts do not establish as a matter of law that there was no reliance on the false representations. "The false pretense or representation must have materially influenced the owner to part with his property, but the false pretense need not be the sole inducing cause. [Citation.]" (People v. Ashley, supra, 42 Cal.2d 246, 259. See also, People v. Hambleton, supra, 218 Cal.2d 479, 482; People v. Conlon (1962) 207 Cal.App.2d 86, 94; People v. Phillips (1960) 186 Cal.App. 2d 231, 239; and People v. Staver, supra, 115 Cal.App.2d 711, 716-717.) Neither the investor's cupidity nor his partial investigation can absolve the defendant as a matter of law, if the evidence sustains findings in support of the elements of the offense. (See People

v. Phillips, supra, 186 Cal.App. at p. 239.) "The doctrine of pari delicto does not apply to criminal prosecutions. [Citations.]" (People v. Otterman (1957) 154 Cal.App.2d 193, 202.)

The questions of corroboration and the instructions on the use of evidence of other transactions for that purpose are discussed below.

The prosecution concedes that defendant cannot be required to undergo separate sentences for a violation of the Corporate Securities law and for grand theft when both offenses arise from the same transaction. (Pen.Code, § 654; In re Wright (1967) 65 Cal.2d 650, 652-655; People v. McFarland (1962) 58 Cal.2d 748, 762-763; Neal v. State of California, supra, 55 Cal.2d 11, 18-20; People v. Rosenberg (1963) 212 Cal.App.2d 773, 777; and see People v. Brown (1958) 49 Cal.2d 577, 590-593; and People v. Kehoe (1949) 33 Cal.

2d 711, 715-716.) The record indicates that imposition of sentence was suspended on all the charges of which defendant was convicted, and that it was ordered that he be admitted to probation for a period of five years on the condition, among others, that he serve the first six months of the probationary period in the county jail. The order recites, "The sentence imposed on each of the seven counts shall commence to run immediately and concurrently with each other."

On this record there is no showing that defendant is undergoing separate punishment for related offenses. (People v. King, (1963) 218 Cal.App.2d 602, 611.) The evidence sustains his conviction under both offenses. If and when he violates his probation and is subsequently sentenced, it may be presumed that the court will do so in accordance with law. (See People v. Oliver, supra, 102 Cal.App. 29, 41.) If

not, review may be sought at that time.

Corroborat (sic)

Corroboration and Similar Representation

Section 1110 of the Penal Code[34] requires corroboration in a case of theft by false pretenses. "If the conviction rests primarily on the testimony of a single witness that the false pretense

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[34]This section provides: "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any labor, money, or property, whether real or personal, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section does not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying, or receiving any money or property."

was made, the making of the pretense must be corroborated. [Citation.]" (People v. Ashley, supra, 42 Cal.2d at p. 259.)

In the instructions which were given before oral argument the court, immediately after defining theft by false pretenses (fn. 33 above), stated: "It has been shown that at or about the same time as that of the use of the alleged false pretenses charged in Counts 6 [grand theft - Beyrle], 7 [grand theft - Yamashita] and 8[grand theft - Van Tuyl] of the Indictment, the defendant made similar false representations to persons other than the complaining witness. If it has been so shown, such evidence, if believed, is sufficient corroboration to comply with the law requiring corroboration, which has been stated to you." (Emphasis added.) In repeating this concept after the oral argument, the court gave the instruction in a completely

hypothetical form.[35]

Defendant contends that the effect of the first instruction was to charge the jury erroneously that the representations were false as a matter of law. (See People v. Mitchell (1961) 197 Cal.App. 2d 493, 501-502.) The first instruction is at worst, ambiguous. It was corrected in the final instructions given to the jury. Under these circumstances no prejudicial error has been demonstrated. (See People v. Dutton (1940) 41 Cal.App. 2d 866, 873.)

The instruction correctly states the applicable law if the jury found the facts

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[35]This instruction read: "If it has been shown that at or about the same time as that of the use of the alleged false pretenses charged in the indictments, the defendant made similar false representations to persons other than the complaining witnesses in each such count, such evidence, if believed, is sufficient corroboration to comply with the law requiring corroboration which has been stated to you." (Emphasis added.)

as hypothesized in the second, correct, instruction. In People v. Ashley, supra, the court ruled, "... the fact that a defendant has made the same or a similar representation to another, although at a different time and place, is a corroborating circumstance. [Citations.] In the present case, essentially similar representations were made to each of the women. There is not only the similarity in express representations, but in basic approach, offers of employment, and repeated supplications. They may therefore corroborate each other." (42 Cal.2d at p. 268. See also, People v. Weitz, supra, 42 Cal.2d 338, 347; People v. Phillips, supra, 186 Cal.App.2s 231, 245-246.)

With respect to the representations made to Beyrle, the record shows that both Rhea and Wellbrock testified that Locke made representations concerning money due him from a labor union; that Locke's

representations concerning the extent of his ownership were embraced in the statements filed with the Corporation Commissioner and in the certificate actually issued and held in escrow; and that in his financial statements he showed accrued earnings from the Lucky Stores contract, despite its contingent nature. Furthermore, the evidence of other transactions warrants the inference that the promises he made to Beyrle were made without any intent that they would be carried out.

Evidence of Similar Transactions

In addition to the transactions charged in the two indictments, testimony was admitted concerning transactions involving Herman Langner, Rilla Morelli, Mary Haynes, and Almoi Jongewaard. Defendant and his attorney both testified concerning a transaction with McGowan. Dr. Connelly and Wellbrock also

testified concerning transactions with defendant. And, a number of witnesses testified to various financial and other aspects of the Check-Stop operation. Defendant's counsel specifically objected to the testimony involving Langner, Mrs. Morelli and Jongewaard, and he interposed a running objection to the admission of evidence of all similar transactions.

The court instructed the jury concerning the limited purposes for which this evidence was received.[36]

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[36] The instruction given before oral argument read: "Evidence was offered in this case for the purpose of showing that the defendant committed other crimes than the ones of which he is accused and for which he is on trial; namely, that he sold interests in Check-Stop or Check-Stop, Inc., to the witnesses Morelli, Langner, Haynes, Wellbrock, Jongewaard and Connelly.* Such evidence was received for a limited purpose only; not to prove distinct offenses or continual criminality, but for such bearing, if any, as it might have on the question whether the defendant is innocent or guilty of the crimes charged against him in these actions.

"You are not permitted to consider that evidence for any other purpose, and

as to that purpose you must weigh such evidence as you do all other in the case. The value, if any, of such evidence depends on whether or not it tends to show that the defendant entertained the intent which is a necessary element of the alleged crime for which he is now on trial, or that there existed in the mind of the defendant a plan, scheme, system or design into which fitted the commission of the offenses for which he is now on trial."

Substantially the same instruction was given after argument, but the court inserted at the point indicated [*] "and possibly others. Whether or not the transactions testified to by those persons constituted crimes, is a question to be decided by you in the light of these instructions and of the evidence in the case. If and only if you find that one or more of such transactions constituted a crime or crimes, you are instructed as follows: ..." When the jury first returned for further instructions, the court distinguished between the transactions in the indictments and the other transactions. With respect to the former, the jury were told "the interests involved in those counts were securities as a matter of law." With respect to the latter, the court read the first part and the insert noted above, and concluded: "Then I told you the purposes for which -- the only purposes for which you could consider those transactions, if you found that they were crimes.

"Now, by your question, I don't know whether you're directing that to those transactions as to which you have to make the determination as to whether

Defendant concedes that the instruction is substantially correct. "While it is true that evidence of other crimes is generally inadmissible [citations], there are a number of exceptions to the rule. Thus, evidence of other offenses is admissible if material to the proof of the crime charged [citations], to show motive, intent or knowledge [citation], and to show a common plan or scheme [citation]." (People v. Sylvia (1960) 54 Cal.2d 115, 119. See also, People v. Weitz, supra, 42 Cal.2d 338, 347; People v. Adamson (1964) 225 Cal. App.2d 74, 75-76; People v. Phillips, supra, 186 Cal.App.2s 231, 245-247; People v. Otterman, supra, 154 Cal.App.

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they constituted offenses or not, or to the transactions which are named in the indictments.

"I will instruct you, however, as to the instructions where you have to determine whether they constitute offenses or not, on the definition of the word 'security' as I previously read it to you,..."

2d 193, 206-208; People v. Mason, supra, 86 Cal.App.2d 445, 453; People v. Dutton, supra, 41 Cal.App.2d 866, 871-872; and People v. Morales (1920) 45 Cal.App. 553, 555.)

He contends that since there is no criminal intent required for a violation of the Corporate Securities Law, the evidence of similar transactions could not be admitted on that issue. He points out there was no issue of identity, and claims that the existence of a common plan or scheme, would not tend to prove or disprove the charges of violation of the Corporate Securities Law.

It is obvious that the transactions were relevant to prove the intent necessary for grand theft; to corroborate the representations made by defendant; and to show that the defendant had a common plan, scheme or design to secure the funds of others to main his unprofitable

enterprise. The defendant's commitments to others were relevant and material in establishing the truth of the statements furnished the Corporation Commissioner and the representations made to Beyrle concerning the extent of his interest in the business. (See People v. Otterman, supra, 154 Cal.App.2d at p.207.) The series of transactions established the background and nature of the enterprise for which he sought the funds of others. "Where several crimes of the accused are of the same general character and tend to the same common end, evidence thereof is admissible to show the motive which impelled the perpetration of the crime for which the defendant is on trial in order to show that the crime charged was a section of the pattern of his life and character [Citation.]" (People v. Mason, supra, 86 Cal.App.2d at p. 453.)

No error is found in the admission

of the evidence concerning defendant's other transactions. The instructions, if anything, were more restrictive than they needed to be.

Grand Theft - Van Tuyl

Defendant contends that the trial court erred in eight respects in connection with his conviction of grand theft resulting from the sale of the tractors. He first asserts that this charge was erroneously joined with the five counts of violation of the Corporate Securities Law, and the two counts of theft which admittedly arose out of the same transactions as give rise to the former charges. (See Pen. Code, § 954.[37] Cf. People v. Kemp (1961) 55 Cal.2d 458, 475-477; People

[37] Penal Code section 954 provides in pertinent part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated....".

v. Wade (1960) 185 Cal.App.2d 226, 234; People v. Walker (1952) 112 Cal.App.2d 462, 470-471; and People v. Thorn (1934) 138 Cal. App. 714, 734-735, with People v. Saldana (1965 233 Cal.App.2d 24, 29-30; and People v. Renier (1957) 148 Cal.App.2d 516, 518-520.) In the absence of any objection in the trial court, the question of improper joinder or consolidation will not be reviewed on appeal. (People v. Fain (1969) 70 A.C. 625, 633; People v. Kemp, supra, 55 Cal.2d 458, 473-474; and People v. Redmond (1966) 246 Cal.App.2d 852, 863.)

Three of his objections go to the sufficiency of the evidence. He contends that there is no evidence to show that the tractors were in fact encumbered when defendant, at the time of the sale, warranted that they were not encumbered; that, in any event, the evidence requires a finding that he was proceeding in good

faith; and that the evidence demonstrates that the purchaser did not rely upon the warranty.

The evidence shows that a chattel mortgage was recorded against the tractor in October 1964 when financing the purchase from Check-Stop. The defendant's self-serving declaration to Richard Wilson that the mortgage had been paid would scarcely suffice to establish that fact, nor would defendant's testimony that Chan Wilson had advised him that the mortgage had been paid. The testimony shows that the check dispatched to Chan Wilson, which represented the amount necessary to discharge the mortgage, was returned for insufficient funds. Van Tuyl's testimony shows that there was a mortgage against the tractors after the sale. The jury could reject the inference that Chan Wilson had advanced the funds to pay off the mortgage, and that after

the sale a new encumbrance was lodged against the tractors. They could infer from the dishonored check and the existence of an encumbrance after the sale, that the original mortgage had never been discharged. Nor were the jurors bound to accept defendant's protestations of good faith.

Van Tuyl's reliance is established by the fact that he required a warranty in the bill of sale. The assumption that he would not have required and relied upon such a warranty if there had not been trouble about repair costs does not alter the transaction as it ultimately occurred.

No merit is found in defendant's contentions that it was necessary for the prosecution to produce the senior Van Tuyl as a witness, or that there was a material variance because the funds paid over by the victim were evidenced

by a check obtained with funds from the senior Van Tuyl's company. (See People v. Thorn, supra, 138 Cal.App. 714, 733-734.) The gist of the offense was the victimization of the purchaser's representative. There was no prejudicial variance because the funds may have come from another.

The evidence of defendant's declarations concerning the naivete of the prosecuting authorities concerning his activities was admissible as an admission bearing on the defendant's intent. (Code Civ. Proc., former § 1870, subd. (2); and see Evid. Code, § 1220.) The use of Van Tuyl's pas-recorded recollection was not improper in the absence of any objection.

Defendant finally contends that the evidence of similar offenses had no relation to the tractor transaction, and that the court erred in not qualifying

the instructions on that subject. He cannot now claim that the evidence was to be used for a more limited purpose than that related by the court, because he failed to request such an instruction. (People v. Weitz, supra, 42 Cal.2d 338, 347; and see People v. Phillips, supra, 186 Cal.App.2d 231, 246-247.)

No error is found in connection with the conviction on the tractor transaction.

Alleged Errors in Admission of Evidence.

Barnett, Beyrle and Wellbrock each testified without objection concerning the nature of the offices which defendant had leased. They were characterized as "plush" and "elaborate". Defendant was also cross-examined, without objection, concerning the nature and use of the premises he leased for his enterprises.

Defendant's failure to object to any of this testimony at the trial precludes consideration of his present

objection that the admission of this evidence portrayed defendant in an unfavorable light. Moreover, the evidence was relevant on the issue of how he was running the business, as that issue bore on his good faith in securing funds from prospective lenders or investors. It also was relevant on the issue raised by defendant's attempt to show that the funds he received for that purpose had all been expended on Check-Stop. His testimony showed use of the premises for other enterprises.

A similar objection is lodged against the evidence concerning the trips made by the defendant. Here consideration is merited by virtue of some objections interposed at the trial. Rhea testified that in November 1963 he advanced $800 to defendant on the latter's representation that he needed it to go to Honolulu to pick up a $1,600 retainer fee; and that

defendant in fact made a three or four day trip. Further inquiry concerning the success of the trip was forestalled by defendant's objection. The court reserved ruling on defendant's motion to strike and subsequently denied it after it was brought out that the reference to the $800 advance was to show that defendant was indebted to Rhea at the time he purported to give him the 15 percent interest in Check-Stop. Thereafter, over objection, Rhea and Wellbrock were permitted to testify concerning two other trips to Hawaii. The testimony, if believed by the jury, that defendant took Rhea and others to Hawaii on a pleasure trip in December 1963 and subsequently paid for it with funds obtained to liquidate obligations of Check-Stop, was relevant on the question of his intent. The Wellbrock trip in February 1964 was allegedly to obtain funds through the sale of property.

Defendant's alleged explanation that this object failed because he left the deed in a desk drawer was similarly relevant on the question of the intent with which he dealt with Wellbrock, and as well with the others from whom he secured funds.

Cross-examination of defendant concerning checks he produced for "General Expenses" properly included inquiry as to whether they included payments for the Hawaii trips, other trips to Lake Tahoe, and checks issued for gambling losses. The only objection to this line of examination was an objection to the form of one question, which was never ruled on by the court because it was followed by a further question and answer. No further request for a ruling was made, nor was further objection interposed.

No prejudicial error is found in the matters of which defendant complains. If he was portrayed in an unfavorable

light it was because he so conducted himself in connection with transactions which were relevant to the issues of the case.

Alleged Misconduct of the Prosecutor

Defendant, in a three-pronged attack contends that there was prejudicial misconduct by the two deputy district attorneys in their respective opening and closing arguments because (1) the prosecutor "improperly speculated and conjectured as to what may have happened or what may have been motive, stated facts not in evidence, and misstated certain parts of the evidence"[38]; (2) the pro-

[38]Defendant alleges the following statements fall into this category: (1) that the only reason that Barnett was included on the application for the permit to issue shares was because Dr. Connelly knew about his 4 percent interest; (2) that the owner of the premises where the tractors were located had probably called the sheriff when an argument ensued over their removal [this remark was prefaced by the district attorney saying it was unknown who had done so]; (3) that the

secutor used a "derrogatory characterization of defendant's counsel and

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jury should consider what happened to the money that was obtained by the defendant from those who testified, what economics might have been effected by defendant, and why the assets remaining when the business closed had not been applied to satisfy its obligations; (4) that defendant probably knew the name of the secretary of the Marine Cooks and Stewards Union and "threw it around"; (5) that "if you believe defendant, our witnesses were all lying"; (6) that the deputy wondered if defendant knew, at the time he filed, that Check-Stop was never going to get off the ground; (7) that he speculated as to what defendant would have done if Rhea and Yamashita had wanted more than a 15 percent interest in the business; (8) that there was no proof that the phone bills were actually due and phone service was about to be cut off, as was represented to Beyrle; and (9) that the defense counsel had said, "It's a felony" [reference to the context and the closing phrases of defendant's argument reflects that this quotation was, or was intended to be, "Is it a felony?", and would have been understood as such].

defendant's theories of the case"[39]; and (3) the prosecutor "in the closing argument made an erroneous and prejudicial comment on defendant's pruported failure to explain certain things."

No objection was interposed to any of the statements of which complaint is made in the first two categories. Even if some of the statements were improper "since defendant did not object to them, he ordinarily could not raise the issue of their propriety on appeal unless they

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[39]These complaints related to (1) characterization of the complaining witnesses as victims; (2) characterization of the defendant as a "persuasive, and ... conscienceless men"; (3) general derogatory descriptive references to defendant's conduct and to the business itself; (4) redicule of the contentions that some of the investors surrendered their interest voluntarily and that Beyrle's written agreement bore a false date; and (5) criticism of the defendant's attempt to show Wellbrock's bias by reference to Locke's prosecution of his brother.

were of such character that the error could not have been cured by prompt admonition and instructions of the trial court. [Citations.]" (People v. Love (1961) 56 Cal.2d 720, 732. See also, People v. Robillard (1961) 55 Cal.2d 88, 102; People v. Turville (1959) 51 Cal.2d 620, 636 [the foregoing three cases disapproved on other grounds in People v. Morse (1964) 60 Cal.2d 631, 649]; People v. Ross (1960) 178 Cal.App.2d 801, 808-809; People v. Mills, supra 162 Cal.App.2d 840, 858; People v. Taylor (1958) 159 Cal.App.2d 752, 758; and cf. People v. Beasley (1958) 163 Cal.App.2d 22, 30.) The remarks to which defendant refers, if at all improper, were of such nature that an admonition would have cured any erroneous misstatement of fact or law. (Cf. People v. Love, supra, 56 Cal.2d at p. 733; and People v. Adams (1960) 182 Cal. App.2d 27, 36.) They were not of a type

which would call for an admonition by the court on its own motion. (Cf. People v. Adams, supra, 182 Cal.App.2d at pp.35-36.)

Defendant relies on the general rules governing argument of counsel which have been set forth in People v. Love, supra, as follows: "Counsel's summation to the jury 'must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need ever be introduced because of their notoriety as judicially noticed facts.' (6 Wigmore, Evidence (3d ed. 1940) § 1806, p. 269 ... He may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature .... He may not, however, under the guise of argument, assert as facts matters not in evidence or excluded because inadmissible.... He may not use evidence

offered for a special purpose, such as credibility or state of mind, to argue inferences for which the evidence is inadmissible ... and he may not argue his own belief of guilt based upon evidence not produced in court.... Moreover, counsel may not use arguments calculated to mislead the jury ... or that appeal primarily to passion or prejudice... [Citations omitted.]" (56 Cal.2d at pp. 730-731. See also, People v. Turville, supra, 51 Cal.2d 620, 636; People v. Ashley, supra, 42 Cal.2d 246, 274; People v. Adams, supra, 182 Cal.App.2d 27, 35; People v. Ross, supra, 178 Cal. App.2d 801, 808; People v. Beasley, supra, 163 Cal.App.2d 22, 30-31; People v. Mills, supra, 162 Cal.App.2d 840, 858; People v. Chambers (1958) 162 Cal. App.2d 215, 220-221; People v. Taylor, supra, 159 Cal.App.2d 752, 757-758; and People v. Reznick (1946) 75 Cal.App.2d

832, 841.) When the prosecution's arguments are examined in the light of the foregoing precedents no prejudicial misconduct is found.

Defendant's third general assignment of misconduct stems from the following statements made in the closing argument for the prosecution: "Mr. Locke is on trial and Mr. Locke is the one that we all were looking to for an explanation, and answer, if he has one, to these charges that have been brought. And I put it to you, ladies and gentlemen, he hasn't given any answer at all." The deputy then proceeded to critically analyze the deficiencies of defendant's attempts to show the manner in which the funds he received had been disbursed. She concluded, "I don't know what was in those checks that we don't have. We're not presenting the whole picture in this trial. We're getting just what we

can find. It's like a flashback. The only person who can give the whole picture is the defendant." The defendant then interposed an objection, and although the court purported to deny his motion that the jury be admonished, the court did in fact admonish counsel, in the presence of the jury, that the defendant was not required to offer any proof in the case, and that the prosecution could not comment on the question of whether he did or not.[40]

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[40] The record reflects the following: "[Defendant's Attorney]" Your Honor, I'm going to object to this as improper argument and cite it as misconduct, and request an admonishment. No person in a criminal case is required to prove his innocence. And the books in this case were offered by the defense and objected to by the prosecution. [Deputy District Attorney]: Your Honor, if I may answer that -- may I quote from [defendant's attorney's] argument? We're not trying to hide anything, we're presenting the total picture. The Court: Well, it's true that the defendant is not required to offer any proof in the case, ... [Deputy District Attorney]: Yes. [Defendant's Attorney]: Is there a ruling on my motion, Your Honor? The Court: No, the motion is denied.

Defendant's reliance on Griffin v. California (1965) 380 U.S. 609 is misplaced. In People v. Perez (1967) 65 Cal.2d 615, the court approved the following quotation, "'Under federal decisions a defendant who takes the stand and testifies in his own behalf waives his Fifth Amendment privilege against self-incrimination at least to the extent of the scope of relevant cross-examination .... It matters not that the defendant's

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(Deputy District Attorney]: Thank you. The Court: In view of my later remarks to [Deputy District Attorney]. Go ahead. [Deputy District Attorney]: If I implied the defendant was required to prove all these things, I didn't mean to do so. What I was trying to answer was [defendant's attorney] -- The Court: Well now [Deputy District Attorney], he not only is not required to do these things, but you're not permitted to comment on the question of whether he does or not. That will be the ruling insofar as this argument is concerned. [Deputy District Attorney]: All right."

answer on cross-examination might tend to establish his guilt of a collateral offense for which he could still be prosecuted.... [Citations omitted.]'" (65 Cal.2d at pp. 620-621.) The court concluded, "In our opinion it was not a violation of the federal constitutional privilege against self-incrimination for the prosecutor to argue and the court to instruct that an inference unfavorable to defendant could be drawn from his failure to explain or deny facts within his knowledge relating to counts 3 and 4 or to the collateral offense. The trial court's instruction was general in terms and permitted the jury to draw an inference unfavorable to defendant from his failure to deny or explain any matters within his knowledge, but no claim is made that there was any additional matter beyond the scope of relevant cross-examination that defendant

failed to explain or deny." (Id., at p. 621. See also, Evid. Code, §413.)

The admonition from the court was more than defendant deserved. The prosecution was entitled to comment on the weaknesses of his explanation. Defendant seeks to limit such comment with respect to omissions in defendant's testimony to matters, as in Perez, on which the prosecution sought, but, on defendant's objection, was erroneously denied proper cross-examination. Perez contains no such limitation. The scope of proper cross-examination defines the field in which comment may be made, but the exercise of or attempt to exercise the right to cross-examination is not a condition precedent to comment on the weaknesses and omissions in the defendant's testimony as a witness in relation to issues raised by the charge and the evidence produced by the prosecution.

No prejudicial misconduct is found.

The convictions and order granting defendant probation are affirmed.

Sims, J.

WE CONCUR:

Molinari, P.J.

Elkington, J.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 29 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1008

CLIFFORD J. LOCKE,

Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal of the State of California, First Appellate District, Division One

JURISDICTIONAL STATEMENT

Julian Herndon, Jr.
HERNDON & CFELT
222 SW Harrison GA12
Portland, Oregon
Attorney for Appellant

Of Counsel:
John A. Pickard

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JURISDICTION ON APPEAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No.___

CLIFFORD J. LOCKE,

Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal of the State of California, First Appellate District, Division One

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Court of Appeal for the State of California, First Appellate District - Division One, entered on August 11, 1969.

A timely petition for a rehearing was denied on August 28, 1969, and the Supreme Court for the State of California denied a timely petition for a hearing on October 1, 1969. Said judgment affirmed appellant's conviction and sentence on various charges and upheld the validity of the California Corporate Securities Law against a federal constitutional challenge. The appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Court of Appeal (R)[1] is not reported. It is printed as Appendix "D", to this statement.

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[1]The reference "R" refers to the record on appeal, copies of which are lodged with the Clerk of this Court.

JURISDICTION

By two separate indictments appellant, Clifford J. Locke, was accused of: (1) a violation of the California Corporate Securities Law, Section 26104 (a) in that he sold a security interest in "Check-Stop" to one Sharon Brown on or about June 19, 1962 (TR 13)[2] and (2) violation of Corporations Securities Law Section 26104 (a) and (f) in that he sold an interest to James Barnett on December 24, 1962, to Thomas Beyrle on October 28, 1963, to Billy Rhea and Kumao "Skip" Yomashita on December 10, 1963 (Counts one through four TR 14-16); made false statements in an application for a permit to issue shares of Check-Stop, Inc., in violation of Corporations Code Section 26104 (a) (Count five TR 16), and committed grand theft (by fraud)(Section

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[2]The reference "TR" refers to the transcript on appeal.

484 of the Penal Code) in taking the money of Thomas Beyrle, Kumao "Skip" Yomashita, and in a separate matter of Steven Van Tuyl (Counts six through nine, TR 17, 18). The two indictments were consolidated (Clerk's TR 11). The jurisdiction of the trial court was founded on Penal Code §777. A jury trial began on May 23, 1966 (TR 12) and concluded three weeks later on June 10, 1966 (TR 980).

After deliberating about twelve hours, the jury found appellant not guilty as to the count involving Sharon Brown and the count involving grand theft from Kumao "Skip" Yomashita (TR 983, 984). He was found guilty of all the other counts (TR 908-983).

Appellant moved for a new trial (C1 TR 58)[3] which was denied (C1 TR 60). Imposition of sentence was suspended for

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[3]The reference "C1 TR" refers to the Clerk's transcript copies of which are lodged with the Clerk of this Court.

five years and appellant was granted probation subject to his spending six months in the county jail (TR 992, 992). This was to run concurrently (TR 994).

Appellant filed a timely notice of appeal under Penal Code §1237 on July 29, 1966, pursuant to Rule 3 (a) Rules of Appeal (C1 TR 63). Among the many issues presented was the validity of the California Corporate Security Law as applied to appellant within the meaning of the due process clause of the Fourteenth Amendment of the United States Constitution (R 4, p. 26).

The appeal was heard on April 30, 1969. On August 11, 1969, the Court of Appeals rendered its opinion affirming the conviction on all counts and rejecting the Constitutional challenge (Op 29, 74). A timely petition for rehearing was denied on August 28, 1969 (R 5) and the California Supreme Court denied a timely

petition for a hearing on October 1, 1969 (R 6).

The Notice of Appeal to the Supreme Court of the United States was filed on October 8, 1969 (R 7), and a stay of the remittitur was granted on October 8, 1969.

The jurisdiction of the Supreme Court to review this case is conferred by Title 28 United States Code Section 1257 (2) and 2103. The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

Flounoy v. Wiener La (1944) 321 US 253, 263
Prudential Ins. Co. v. Cheek (1922) 259 US 530, 547
Mishkin v. New York (1966) 383 US 502, 512-13
Lambert v. California (1956) 352 US 914, decided, 355 US 225
Smith v. California (1959) 383 US 926, decided 361 US 147
Edwards v. California (1941) 314 US 160, 171
Robinson v. California (1961) 368 US 918, decided 370 US 660
Powell v. Texas (1967) 389 US 810 decided 392 US 514

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Constitution of the United States are:

Amendment V and VI, which is included in Appendix A, infra
Amendment VIII which is included in Appendix A, infra
Amendment IX which is included in Appendix A, infra

The validity of a statute is involved. It is California Corporate Securities Law §26104 (a) - (f) (West's California Code Annotated), which is set out in Appendix A infra.

Another relevant statutory provision is Penal Code §484 which is set forth in Appendix A, infra.

QUESTIONS PRESENTED

1. The Constitutional Question - Is the Corporate Securities Law of the State of California (Corp. Code, former Section 25000 et seq., particularly

Section 26104, subds (a) (b) and (f) as in effect prior to January 2, 1969, and preserved by Section 25704, subds (a) as added by the Corporate Securities Law of 1968) constitutional?

(a) It is proper or even constitutional within the meaning of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution to punish as a felony an act unaccompanied by mens rea?

(b) Since the statute dispenses with the requirement of mens rea and the term securities is not defined, is not the statute void for vagueness within the meaning of the due process in that it does not provide an adequate warning?

(c) Does not the statute, therefore, represent a cruel and unusual punishment within the meaning of the Eighth Amendment of the United States Constitution?

2. Additional Federal Questions -

Does the probability that the prosecution albeit inadvertently, suppressed exculpatory evidence require a court to remand the appeal for a hearing on this issue and should the court on remand find such to be the case grant a new trial under Brady v. Maryland, (1963) 373 US 83.

3. In order to prove prejudice due to undue publicity within the meaning of Estes v. Texas (1944) 381 US 532, it is necessary for the defendant to request a change of venue, continuance, prove on voir dire obvious prejudice particularly in view of the voluminous and dramatic pre-trial and trial media publicity that occurred in this case.

4. Since the California Corporate Securities Law dispenses with the requirement of mens rea and does not define the term "security" was not the trial court's instructions that the various transactions in issue were securities as a matter of

law tantamount to directing a verdict of guilty in violation of the due process clause of the Fourteenth Amendment of the United States Constitution and an abridgment of the appellant's right to trial by jury within the meaning of the Sixth Amendment of the Constitution?

5. In light of Shuttesworth v. Birmingham (1965) 382 US 87, is it not necessary for a conviction to comply with due process of law that each element of the crime charged (in this case fraud) supported by the evidence?

STATEMENT OF THE CASE

Appellant is a former famous sergeant of the San Pablo Police Department (TR 121) who left the department in 1960 and started a private detective agency in El Cerrito, California (TR 608). In 1962 he conceived and began another business, which was designed to sell the

names of bad check passers to subscribing merchants. Appellant compiled an extensive list of persons who had passed bad checks, installed an elaborate telephone system, and sold the information to area retailers for an agreed fee per month. When the subscribing merchant was in doubt as to whether to cash a check, he would telephone appellant's business known as "Check-Stop", and through the use of a Remington Rand Cardveyor (TR 610), in approximately one minute, could determine whether the person presenting the questioned check had a history of passing bad checks.

In April 1963, Check-Stop was incorporated. The Division of Corporations issued a restricted permit allowing the issue of stock to six individuals and said permit expired by its own terms on October 10, 1963. The stock issued under this permit was required to be held in

escrow.

The jury found that on December 24, 1962, appellant sold a security interest to James Larry Barnett in violation of Corporation Code Section 26104 (a) and (f). Mr. Barnett originally met appellant when Mr. Barnett was employed by the telephone company. In this capacity Mr. Barnett arranged the telephone system for Check-Stop, then subsequently became employed by appellant as sales manager. The employment agreement was made approximately one month prior to the transaction of December 24, 1962.

The next alleged violation of the Corporations Code Section 26104 (a) and (f) occurred on October 28, 1963, when, the jury found, appellant had sold a security interest to Thomas A. Beyrle in violation of said statute, and also found appellant guilty of grand theft by false pretenses as a result of this

transaction.

Mr. Beyrle was looking for an investment and was referred by a local banker in 1963. The parties came to an agreement whereby Mr. Beyrle loaned $7,200 to appellant, and in return was to receive an interest in Check-Stop, and also an interest in appellant's other business, the Locke Detective Agency.

The third and fourth alleged violations of Corporations Code Section 26104 (a) and (f) occurred on December 10, 1963. Appellant was convicted of selling security interests to Billy L. Rhea and Kumao Yamashita. Both Mr. Rhea and Yomashita were automobile salesmen for the East Bay Chevrolet Company. Mr. Rhea was acquainted with appellant prior to the transaction in question, and he introduced Mr. Yomashita to appellant. Mr. Rhea then loaned appellant first $800 and then an additional $925; Mr.

Yomashita loaned appellant $4,500. Appellant gave each of them a document in which he agreed to apply to the Corporations Commissioner for permission to sell or issue stock to both parties. Appellant also gave Mr. Yomashita a note for $6,500, which was to cover both the loans made by Mr. Rhea and Mr. Yomashita.

The trial court first instructed the jury that criminal intent is not an element under the Corporate Securities Law (TR 953). Then it instructed the jury that all the transactions charged were security interests as a matter of law (TR 952, 953, 960, 967, 973-979), thus taking from the jury the sole issue involved with respect to violations charged under the statute.

Throughout the trial defendant contended he had no intent to solicit securities and that he thought he was entering into a partnership, joint venture,

or at least a pre-incorporation agreement but had no inkling that he was soliciting securities.

The final alleged violations of the Corporate Securities Law involves Section 26104 (b) of the Corporations Code. The jury found that appellant failed to report certain liabilities of Check-Stop existing when the financial statement, submitted as an exhibit to the application for a permit to issue stock was filed on April 9, 1963.

The violation appealed herein involves a fact situation entirely unrelated from those already mentioned. The jury found appellant guilty of grand theft by false pretenses as set forth in Section 484 of the Penal Code. The transaction took place on January 15, 1965 and involved two caterpillar tractors. On the above date appellant sold them to Mr. Steven E. Van Tuyl for $5,000. The tractors were

allegedly represented as being unencumbered.

HOW THE FEDERAL QUESTIONS WERE RAISED AND THEIR DISPOSITIONS

The Constitutional Question

In the appeal of this case to the Court of Appeals there were two sets of briefs, one by the public defender and one by substituted counsel.

In the first set, it was contended that since the Corporate Securities Law dispenses with mens rea, People v. McCalla (1923) 63 Cal App2d 783, it is the type of law that condemns before it hears which Chief Justice Marshall complained about in Dartmouth College v. Woodward, 4 Wheat (US) 518, and is similar to the statute struck down in Meyer v. Nebraska (1923) 262 US 390, 67 L ed 1042, 43 S Ct 625.

In the reply submitted by appellant's substituted counsel, the point was further elaborated.

It was suggested that this statute is clearly unconstitutional within the meaning of the due process clause of the Fourteenth Amendment of the United States Constitution, since it punishes as a felony an act unaccompanied by mens rea. It was suggested that the United States Supreme Court has reluctantly, but never unhesitantly upheld dispensing with mens rea for only minor misdemeanors, so-called malum prohibitum crimes. It has never done so for felonies and indeed in Morissette v. United States (1952) 342 US 246, 96 L ed 288, 72 S Ct 240 the court expressed concern for such a law. It was further submitted that the statute does not provide an adequate warning within the meaning of Lambert v. California (1957) 355 US 225, 2 L ed 2d 228, 78 S Ct 240, Smith v. California (1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215.

The Court of Appeals sustained the

act (Op 20-20). The Court conceded that the statute does not require criminal intent, but stated that the statute has been upheld against a series of attacks (Op 28); never, appellant reasserts, however, on the grounds mentioned herein. The Court said:

> "Defendant seeks to set aside his conviction on the five counts which charge violations of the Corporate Securities Law because section 20104 of the Corporations Code under which he was indicted and convicted is unconstitutional. This contention is predicated upon the theory that it is a violation of the Fifth, Ninth and Fourteenth Amendments of the United States Constitution to punish as a felony an act which is not accompanied by the mens rea or scienter which was required by the common law."

> "In People v. Hernandez, supra, the court cited People v. McCalla as an example of an instance where 'culpability has been completely eliminated as a necessary element of criminal conduct in spite of the admonition of section 20 to the contrary.' (61 Cal.2d at p. 532.) The court, however, did not overrule McCalla, but recognized that there were, and distinguished, situations where the governing statute by implication or otherwise expresses

> a legislative intent or policy to be served by imposing strict liability. (Id., p. 533. See also, People v. Superior Court (1969) 70 A.C. 129, 138-139; and People v. Wells (1968) 261 Cal. App.2d 468, 478-479.) The Corporate Securities Law is such a statute, and, in other aspects, it has generally been upheld against attacks of unconstitutionality."
>
> "In People v. Sears, supra, the court observed, 'The language of the Corporate Securities Law provides an adequate warning as to what conduct comes within its prohibition. [Citations.] The language conveys a sufficient definite warning from which any person engaging in the business of issuing or selling securities may ascertain whether his business or enterprise has a sanction of law.'"

The court also said that legislature has the power to impose strict liability (Op 27-28). The appellant concedes this has been approved, but only for minor misdemeanors, not for felonies. Significantly, the court did not consider the fact that the penalty imposed under this statute is a felony, i.e. maximum five years in the penitentiary. The court also said the statute provides an adequate

warning (Op 28), assuming this is determinative.

In the petition for a rehearing, and in the petition for a hearing to the State Supreme Court, appellant demonstrated that since the term "security" is not defined it is impossible for the act to provide an adequate warning. The court felt that it was unnecessary to certify to the existence of a federal question since the record clearly indicates the existence of one.

THE OTHER FEDERAL QUESTIONS

Undue Publicity

Due to appellant's great notoriety there was considerable pre-trial and trial newspaper and media coverage. Most of the articles were really releases from the police department. They all contained references to the fact that appellant was being investigated for many other

matters. Some were quite dramatic. There were references to witnesses crying on the stand and a widow telling of losing their life savings. The publicity was virtually statewide. See Appendix "C" for some of them, infra.

In the appeal, appellant suggested that this case was onall fours with Estes v. Texas (1964) 381 US 532, 538, in view of the similarities between the factual patterns of the two cases. However, the Court of Appeals rejected this saying that the accused failed to prove obvious prejudice (Op 25) and citing state decisions, People v. Richardson (1968) 258 Cal App.2d 23 as controlling the disposal of the federal question. However, Estes flatly rejected this requirement since the probability of prejudice is inherent by the voluminous and dramatic publicity as occurred herein.

SUPPRESSION OF EXCULPATORY EVIDENCE

As indicated in Appendix "B", it is evident that the State inadvertently suppressed exculpatory evidence. These facts became known to appellant after the appeal was argued. So in his petition for rehearing, he requested that at least the case be remanded for a hearing on this issue, by authority of Brady v.Maryland (1963) 373 US 83. It was suggested that Brady clearly demonstrated that this issue can be raised at any time even after the appeal was concluded. In Brady it was presented on post conviction relief long after the time for appeal had elapsed.

INSTRUCTING A VERDICT OF GUILTY

At the trial, further, the court instructed as a matter of law that each of the transactions charged were security interests (TR 979-952). Appellant suggests at the trial (TR 979-973) and throughout the appeals (Reply 1-2, 10, 22) that this

fraud beyond a reasonable doubt. It was suggested that all the elements of legal fraud were not proved by even the preponderance of the evidence. It was suggested that the totally devoid of evidentiary support rule of Thompson v. Louisville (1960) 362 US 199, has been largely abandoned by Shuttlesworth v. Birmingham (1965) 382 US 87, and similar cases. Now, each element of the crime must be supported by the evidence in order to comply with due process of law. The Court of Appeals rejected this saying there was sufficient evidence to support the finding of fraud.

OTHER QUESTIONS

Many other questions were submitted to the Court of Appeals, many falling within the general principles of due process of law such as the prejudicial instructions concerning the fraud charges

and the general problems that arise by trying a crime requiring mens rea with one that does not. However, although they were answered by the Court of Appeals primarily on state law, they may provide important issues that should be resolved by this Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The Constitutional Question - Dispensing With Mens Rea For Felonies

The question presented herein is one of first impression, having never been considered by this court, although the court has indicated on occasion in dicta grave concern about dispensing with mens rea for felonies. Appellant submits that the California Corporate Securities Law is typical of the securities laws throughout the country, and is indicative of the growing spate of statutes that impose harsh criminal sanctions upon the blame-

less; or those who do not possess mens rea in order to relieve the prosecution of proving an often difficult element.

1. Appellant respectfully submits that it is a violation of due process of law within the meaning of the Fourteenth Amendment of the United States Constitution to punish as a felony an act unaccompanied by mens rea. Indeed, such runs counter to the very foundations upon which this and all countries based upon Anglo-American principles are based. This principle can be found in the Magna Carta:

> "A free man shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it, saving to him his contentment; and after the same manner a merchant, saving to him his merchandise. And a villein shall be amerced after the same manner, saving to him his wainage, if he shall fall under our mercy; and none of the aforesaid amerciaments shall be assessed but by the oath of honest men in the neighborhood." Section 20

In Dartmouth College v. Woodward, supra, Chief Justice Marshall said this results in a law that condemns before it hears in violation of due process.

Appellant suggests, therefore, that the time has come to put a stop to attempts to dispose with mens rea for felonies. This Court has reluctantly upheld dispensing with criminal intent for minor misdemeanors or so-called malum probitum crimes. However, the court has never unanimously and unequivocally upheld such, even for misdemeanors. In every case, without exception, wherein the court has upheld such, there has always been a proviso indicating less than complete approval.

This Court, however, has never endorsed dispensing with mens rea for felonies, indeed this issue has never been tendered for resolution; however, it has expressed grave concern for such

a law. In Morissette v. United States supra, Mr. Justice Jackson speaking for the court quoted from Justice Cardoza in indicating some clear limits on imposing criminal liability without fault.

This Court has had a continuing struggle over the concept of mens rea. It has repeatedly reiterated the basic principle:

> "... the existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

Dennis v. United States (1950) 341 US 494, 500, see also Lambert v. California (1957) 355 US 225, Smith v. California (1959) 361 US 147, and indeed Robinson v. California (1962) 370 US 660. In all these cases, this court has indicated that criminal responsibility does have constitutional dimensions.

Only last term Mr. Justice White indicated in his concurring opinion

in Powell v. Texas (1968) 392 US 514, 549-554, that he was prepared to accept a requirement of mens rea for all criminal prosecutions.

Appellant, submits that at the very least, mens rea should be required for all felonies in order for American criminal jurisprodence to maintain its enlightened position throughout the world. Yet the trend throughout the country is the reverse as the California Corporate Securities Law demonstrates.

Felonies have been reserved for those crimes considered malum-in-se those inherently evil. The purpose of a lengthy prison term is to deter and rehabilitate evil minds, it is said. If someone does not have an evil mind, how can he be deterred or rehabilitated by a lengthy sentence. To punish just an actus reas can serve no purpose other than retribution. Logically, by dis-

pensing with criminal intent neither accident nor insanity is a defense under this type of a statute.

In the field of criminal law, no question occupies today's scholars, reformers and legislators as much as that of the mental element of crime, mens rea. The interest is world wide. Even in the Soviet Union, an astonishing ration of printer's ink and paper has been apportioned for scholarly excursus on the topic.

Raschkowskaja "On the Question of the Degrees of Guilt," Sovetskoe Gosvdarstve 58 (Russia Jan. 1955); 5 R.I.D. 70 (Germany 1956); Tschikwadse "On Some Questions of Soviet Penal Law," 59 (Russia Sept. 1954); 3 R.I.D. 643 (Germany 1954); and particularly Ssergejewa, "On the Question of Individualization of Penal Responsibility," Sovetokoe Gosvdarstve, 33 (Russia Jan. 1951).

All over the world mens rea has

been made a principal ingredient for all major crimes, i.e. felonies. See 5 Jimenez De Asua, Tratado De Derecho Penal. Blau "Enige Bemerkungen zu dem Lehrbuch des Strafrechts von Jimenex de Asua, 66 Zeitschrift Fur Die Gesamte Strafrechtswissenschaft 297 (Germany 1954). There is no textbook on criminal law which does not begin with, or early make the assertion that every crime is composed of an act and intent.

In this case, appellant entered into a series of transactions, which the court instructed the jury as a matter of law that they were all security interests. The defendant maintained throughout the trial that he honestly felt that he was entering into partnerships, joint ventures, or preincorporation agreements and had no idea, much less intent, to solicit securities, yet the trial court disagreed and so instructed the jury.

Further, appellant maintained throughout that he did not intend to bilk anyone and indeed every alleged victim has been paid back. The state conceded that it was possible that defendant may have honestly felt he was not soliciting securities, and had no intent but this was irrelevant under the statute since accident, or the like is not a defense.

The State was correct legally under state law because it is only necessary that the defendant be conscious of his acts and a conviction is required. For this a defendant faces five years. The appellant will be in legal custody for five years after serving a six month prison term, despite as the State conceded, he had no evil intent whatsoever. Appellant submits that in no other country based on Anglo-American principles can something like this occur.

2. The Court of Appeals answered

the above argument, in part, by saying the Corporate Securities Law provides an adequate warning (Op 28). Appellant suggested, however, that it is impossible for the statute to provide an adequate warning, as noted throughout the trial of this case and the appeals, the term "securities" is not defined by the statute. Instead, the California courts have preferred to construe the term on a case by case method. The lower court's opinion (Op 34-53) clearly demonstrates some of the multitudinous occasions the courts have had to construe the term. If the statute does not provide an agreed warning for the California courts or lawyer, how can it provide an adequate warning to the average layman.

A Californian had better not attempt to form and finance a business of any kind because if a court later construes his acts as the solicitation of security

interests he must be punished since mens rea is not an element. No amount of judicial interpretation can save this statute. The California statute is a typical in not defining the term which only exacerbates dispensing with mens rea.

Thus, the sanctions under the statute are also a cruel and unusual punishment within the meaning of the Eighth Amendment. A host of problems arise from dispensing with mens rea. The purpose of doing os is that it relieves the community of the burden of proving a difficult element. Appellant suggests however, this is not too great a burden when a man faces five years in prison.

THE PROPER INTERPRETATION OF ESTES v. TEXAS (1964) 381 US 532 .

The appellant suggests that the Court of Appeals determined the issue of undue

publicity in a way probably not in accord with applicable decisions of this court. The court cited People v. Richardson (1968) 258 Cal App 2d 23, 27-29 as controlling the federal question, in holding that the appellant must be able to prove obvious prejudice. However, People v. Richardson is impliedly vacated by Estes v. Texas (1964) 381 US 532, and to a lesser degree by Sheppard v. Maxwell (1966) 384 US 888.

Both cases held that the defendant need not prove actual prejudice where the probability of prejudice was great. It is probably necessary for this Court to make explicit certain aspects of its holding in Estes.

In this case, the publicity was extensive, virtually state-wide, and quite dramatic as the appendix to the brief, to the court of appeals demonstrated. Appellant did not request a change of venue; however, Mr. Estes made only one

request but the publicity continued unabated; he did not make a second request. Further, there was no record of Mr. Estes requesting a continuance nor asking the jurors on voir dire about the publicity nor exhausting his peremptory challenges. Yet the court below here felt these were a prerequisite; this was not the ruling in Estes. Further, the jury was sequestered during Estes' trial, they were not in this case. Included in the appendix are only some examples which were submitted to the lower court of the type of notoriety that took place before and during the trial. Appellant urges that the volume was overwhelming and most of it were releases from the police department.

Appellant respectfully suggests that this Court should not countenance the type of free for all that took place during the trial and should not permit the gradual erosion of the apparently

rather clear principles promulgated in Estes.

THE PROPER INTERPRETATION OF BRADY v. MARYLAND

Appellant submits that this court can expect many cases involving further amplification of the principles crystalized in Brady v. Maryland (1963) 373 US 83. In that case, this court held that the suppression of exculpatory evidence, upon request at anytime by the prosecution is a denial of due process irrespective of the good or bad faith of the prosecution. Thus, and the case made clear that this issue may be raised at anytime even on collateral attack. Brady raised the issue on post conviction relief long after the time for appeal had elapsed. This is based on the principle that a conviction that violates due process is a nullity, indeed a jurisdictional bar that

makes it vulnerable to collateral attack, cf. Johnson v. Zerbst, 304 US 458, and United States v. Morgan, 346 US 502. The facts as applied to appellant become known long after the appeal had been argued. Thus, appellant raised the issue in his petition for a rehearing and petition for a hearing to the California Supreme Court. A copy of the affidavit can be found in Appendix "B" to this statement. It is apparent and the appellant feels he can so prove on remand that the account book suppressed contained very exculpatory evidence in this most complex case pertaining to the alleged false statements to the Commissioner and the fraud charges. Accordingly, he requested in his rehearing the court remand this case for a hearing by authority of Brady and should he be able to prove the allegations the conviction set aside.

Appellant respectfully submits that it may be in order for this Court to remand this case without prejudice regarding the other issues with directions that the trial court afford him a hearing on this issue. Plenary consideration, however, may be desirable so this court can consider the ramifications of Brady in depth.

INSTRUCTIONS AS TANTAMOUNT TO DIRECTING A VERDICT OF GUILTY AND ABRIDGING APPELLANT"S RIGHT TO JURY

The trial court instructed the jury that the various transactions charged in the indictments were security interests as a matter of law. This was tantamount to directing a verdict of guilty since criminal intent is not an element.

To withdraw crucial questions from the jury is to usurp its function, Davis v. Virginia R. Co. (1959) 361 US 354. No

matter how conclusive the evidence may be, the trial court may not direct a verdict of guilty, United Brotherhood, C & J v. United States (1946) 330 US 395, 91 L ed 973. Any other rule makes the right to trial by jury under the Sixth Amendment nugatory. Only a man's peers has the power to convict, not the court. The court below agreed that this is the general rule but held it is inapplicable to this case where the court alleged, there was uncontroverted evidence. This appellant strenuously rejects. Further, there is really no such thing as uncontroverted evidence pointing to guilt in a criminal case. The burden is entirely upon the prosecution; the defendant need do nothing. Even if the defense offers no evidence which is demonstrably not the case here, the state's evidence does not necessarily stand as uncontroverted until the jury determines it so, which includes

determining the witness' credibility and the like. What the court thinks is not controlling; it is what the jury thinks.

The length of the trial (three weeks) however, is a clear indication that the state's evidence was certainly controverted. The problems involved here demonstrates once again the difficulties inherent in dispensing with mens rea. This makes the issue pertaining the securities the most crucial issue of the case. Thus, the court's instructions were tantamount to directing a verdict of guilty. This is a clear violation of a defendant's basic rights to a fair trial and is a grave miscarriage of justice.

OTHER FEDERAL QUESTIONS

Although the Constitutional question is sufficient to give this court jurisdiction by appeal and the others give this court jurisdiction by appeal when

added to the first and by certiorari standing alone; and they are substantial, many other questions were presented which this court may determine warrant plenary consideration.

Among these is whether the totally devoid of evidentiary support rule has been broadened to require evidentiary support of each element of the crime charged. Shuttlesworth v. Birmingham (1965) 382 US 87. In this case, appellant submits the charge of theft by fraud, specifically intent to deceive and reliance are totally lacking in evidentiary support as indeed is the falsity of the representation.

In addition, are certain problems raised by trying together a crime involving criminal intent and one that does not. Among the difficulties is that the prosecution is permitted to get into evidence certain types of evidence that

it could not otherwise do had the crimes been tried separately.

CONCLUSION

Since this court has never ruled on the issues presented in the constitutional question and the California Corporate Securities Law is typical of the so called blue sky laws throughout the country and is in keeping with the trend, appellant respectfully submits that this is a substantial question a resolution of which could have profound ramifications. It is difficult to understand why in 1969 this question is still one of first impression. The other federal questions demonstrate the need for further clarification of certain important principles already established by this court; many others need further amplification or are gradually being eroded by the lower courts so as to suggest the immediate attention

of the court may be necessary.

It is respectfully submitted, therefore, that probable jurisdiction should be noted and the case set for argument.

Respectfully submitted,

Julian Herndon, Jr.
Herndon & Ofelt
222 SW Harrison GA12
Portland, Oregon

Counsel for Appellant

Of Counsel:

John A. Pickard

SUPREME COURT OF THE UNITED STATES

October Term, 1969

LOCKE *v.* CALIFORNIA

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 1008. Decided February 24, 1970

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.